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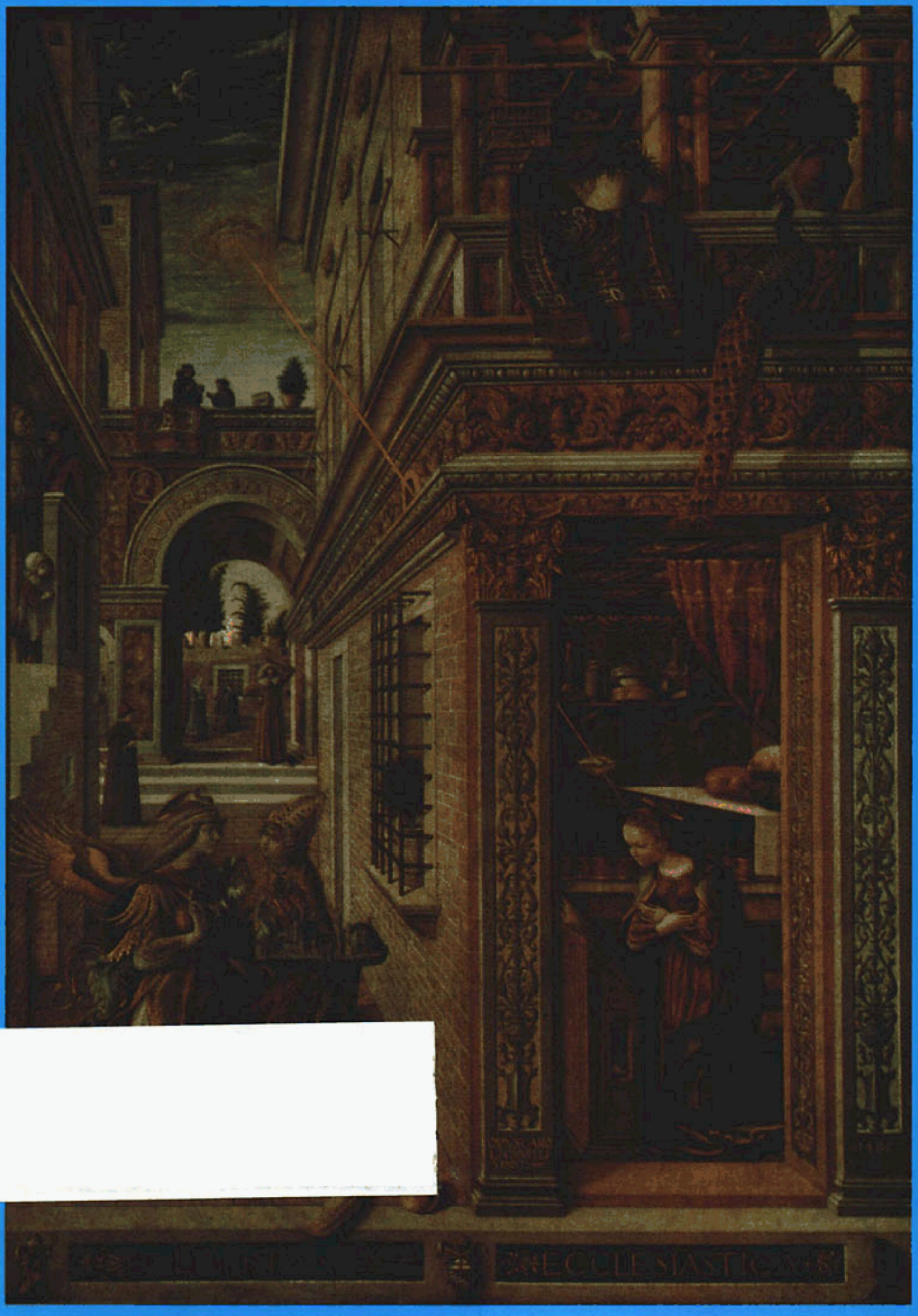

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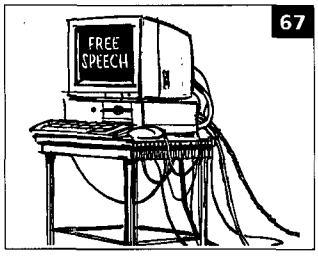

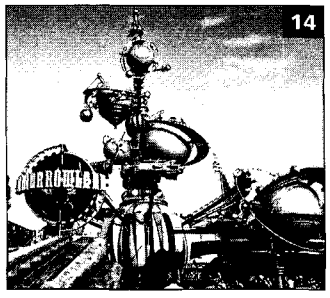

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No Telling

The push for Internet privacy controls combines a bad theory with a dangerous agenda.

By Virginia Postrel

Over the past week, I received about two dozen unsolicited mass e-mails, otherwise known as "spam." About half were devoted to sex, including six messages promoting a new *Hustler* Web site and one paradoxically promising a site "SO HOT WE CANT SHOW IT ON THE WEB." Most of the rest advertised the stuff of late-night TV commercials and dubious classified ads: "LUXURY CARS FOR UNDER $1000" from government auctions, family histories and coats of arms ("All Nationalities"), credit cards for people with lousy credit records, a psychic hotline. One offered to teach me how to become a spammer myself. The most reputable-seeming message promoted a site for golf-related classified ads.

I wasn't interested in any of them. None of the spammers had bothered to find out the most obvious facts about me —*Hustler* is not known for its appeal to women—much less to determine, for instance, that I have an excellent credit record and don't play golf.

Spam costs virtually nothing to send, and it bothers the people who receive it. That upsets "privacy advocates" and their friends in Congress: "No one—from the consumer to the small business[es] who run servers—should be forced to pay for unsolicited advertisements," said Rep. Chris Smith (R-N.J.) when he announced a bill to ban spam. Smith is too easily outraged. A week's worth of junk costs me maybe a quarter, hardly the sort of expense that justifies congressional action.

The cost to Internet service providers can indeed be substantial, and suits by American Online, Earthlink, and other ISPs have already forced big-time spammers to pay large damages for violating the ISPs' terms of service. But for consumers, spam should be of no more public concern than grocery lines, Sunday drivers, or squirming children in restaurants; it is simply part of living with other people, and the solution is as close as the delete key. To demand legal action every time something annoys you is the surest way to end up living in a conflict-filled society ruled by intrusive regulation and constant litigation. Telling people to hit "delete" or let their ISP know they're being bothered won't attract TV cameras, however. For that you need a crisis and a bill.

Cyberspace is full of "crises" these days, many involving "privacy rights," and Congress is full of bills to address them, 32 by one count. What really has privacy advocates riled isn't spam but its exact opposite: targeted marketing information. Cyberspace offers people the chance to easily find others with similar interests—hence the flourishing of specialized Web sites and Usenet groups. That same efficient search, enhanced by sorting software, has commercial applications. Web sites can collect data from the people who visit them and either display individually tailored advertising or send visitors product information later. Or they may not be interested in individual information at all but in general patterns and aggregates: What is the average age of our audience? Which parts of our site are most popular? Where do our visitors come from?

The answer to the burning question, How is anyone ever going to make money on the Web?, probably lies in collecting and efficiently using such information. Eventually commercial sites must pay for themselves, and one of the most promising ways to do so is to use them to find customers for other products and services.

Absent a single, government-imposed rule for what information can be gathered and how it can be used, commercial Web sites have taken many different approaches: Some let individuals choose exactly what to reveal about themselves and how to let the information be used. Others tell visitors how they intend to use information and leave it to each visitor to decide whether to stick around. Still others say nothing at all, letting the surfer beware. (Common sense goes a long way in those cases: If a site asks your name, address, and telephone number, chances are the company may someday try to sell you something, and it may also rent or sell the information to others.) Meanwhile, software has been developed that gives Web browsers more control over what information can be automatically collected about them. And many people surf anonymously.

This laissez faire regime not only allows different strokes for different folks. It also lets bootstrapped Web sites grow without immediately creating complex systems for managing information from visitors. It allows small operations to informally poll people without violating federal laws. It permits experimentation and learning. It fits the flexible, diverse, entrepreneurial, sometimes-amateurish world of the Web.

Very little of this commercial activity has hostile intent, unless you consider advertising assault. But it displeases people for whom "privacy" is an absolute. Under pressure from privacy lobbyists, the Federal Trade Commission is out trolling the Web, looking for sites that dare to collect information from visitors without posting a "voluntary" privacy policy. But privacy policies, voluntary or not, won't satisfy advocates who are determined to impose a single standard on everyone.

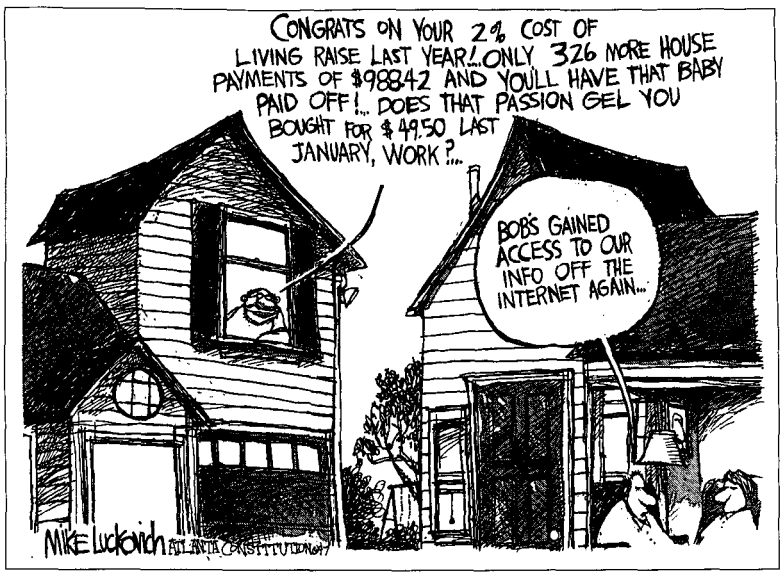
Testifying before a House subcommittee in late March, Marc Rotenberg, the director of the Electronic Privacy Information Center, condemned the variety and gradual evolution of privacy standards. "Where once individual *consent* was central to the disclosure of personal information, now the focus is on individual *choice* for a range of disclosures," he said. "Where privacy techniques focused on the means to protect identity, now the focus is on means to obtain information. Many of the techniques that are put forward as 'technical solutions'...will make it easier, not

more difficult, to obtain information from individuals using the Internet. Something is clearly amiss."

Rotenberg is infuriated by the very idea of "self-regulation." Debating how to give Web surfers choices, he maintains, detracts from the urgent need to adopt a single, technocratic standard for everyone. All this choice is too disorderly and out of control. It does not produce the outcome Rotenberg wants. "[S]elf-regulation has not helped protect privacy on the Internet," he says. "It has in fact made it harder for us to focus on the larger questions of a coherent privacy policy. It has also led to erosion in our basic understanding of privacy protection." Self-regulation has permitted diversity and allowed people to disagree. If you believe that "privacy" is an inalienable right, that is an intolerable situation.

By their nature, new communications technologies make it harder to keep secrets: "We shall soon be nothing but transparent heaps of jelly to each other," worried a London writer in 1897, concerned about the telephone. And there is no question that the general public is anxious about protecting privacy in cyberspace. They've heard lots of scary stories about stalkers, child molesters, con artists, and credit card fraud. They've read George Orwell. They're easily persuaded that every corner of the Web is filled with vicious evil people. "Privacy advocates" like Rotenberg tap into that generalized fear—much of it a fear of totalitarian government—to justify a broad agenda of commercial regulation, based on dangerous assumptions about the nature of information and identity.

True to our technocratic political culture, people are unwilling *when asked about the subject* to be patient. A much-cited *Business Week* poll found that 53 percent of respondents said that "government should pass laws now for how personal information can be collected and used on the Internet," while 23 percent said that "government should recommend privacy standards for the Internet but not pass laws at this time." Only 19 percent said that "government should let groups develop voluntary privacy standards but not take any action now unless real problems arise." As David Medine, the FTC's point man on the issue, told *Business Week*, "This is the last year for industry to demonstrate effective self-regulation."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MIKE LUCKOVICH ATLANTA CONSTITUTION

Before we rush to replace diverse and voluntary standards with a single, inflexible approach, however, it's worth considering the many different issues subsumed under the label "privacy" and "personal information." The stakes are much higher than advocates like Rotenberg often admit: In the name of privacy, activists are pushing serious restrictions on the freedom to gather and disseminate truthful information—otherwise known as freedom of speech and the press. They are demanding that businesses provide valuable information without reaping anything in return. They are seeking to impose today's preferences, technologies, and limited imagination on the unknown and evolving future. And the world of stifled speech they want to create is not limited to a few big players in a well-defined (and implicitly suspect) "industry." It includes everyone who sells anything or collects any information in cyberspace: from Time Warner and Yahoo! to startup entrepreneurs working out of their spare bedrooms and teenagers gathering e-mail addresses of fellow Leonardo DiCaprio fans.

Privacy advocates begin with the assumption that you own your "identity"—all the disparate information about yourself—and therefore have the right to control which information is available to others. That's what Rotenberg means when he refers to "consent." Such activists want to require that before someone can tell someone else a fact about you, the teller should have to get your permission; you exclusively own the facts about your life, your "personal information."

But this premise simply isn't true. The other party in any relationship—whether your former landlord, your boss, your ex-girlfriend, or Amazon.com—owns information about you as surely as you do. Gathering and sharing such information is as old as gossip and is absolutely essential to a free society. Neither speech nor commerce can function if such communication is illegal. Privacy advocates want to outlaw not only journalism but reputation.

If we are in fact worried about what happens to electronic information about our lives, well-established systems of contract and criticism can control who says what to whom, with whose permission. The very systems Rotenberg scorns for emphasizing "choice" over "consent" allow parties to agree in advance which information, if any, will stay private. Breaking such an agreement would violate contract law. And just making the deal leads Web sites to invest the time and effort to create systems that will honor it. That's what "privacy policies" are all about.

Nor is contract the only check on unwanted information sharing. Criticism works too, especially when directed at companies that must compete for customers. Faced with outraged clients, America Online reversed its decision to let telemarketers use members' phone numbers, a practice that wasn't specifically forbidden in its terms of service. Amazon has been careful to protect the information it collects about customers' book-buying habits, using it internally but not offering it to outsiders; that information could be quite valuable to other direct marketers (including REASON), but its sale would create an enormous controversy. (The

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obvious way around such controversy, of course, is to offer lists only of customers who have agreed to be on them—a contractual solution.)

Neither contract nor criticism is perfect. Leaks happen at private organizations, just as they do with grand juries, the Internal Revenue Service, and prosecutors' offices; they just happen somewhat less frequently, and the legal consequences for the leaker are swifter and more severe. Earlier this year, an AOL employee blatantly violated the company's contract with customers by telling a caller which AOL member had a particular screen name. That information led the Navy to begin discharge proceedings against a decorated, 17-year-veteran sailor for being gay. The sailor successfully sued the Navy on the grounds that its investigation violated the "don't ask, don't tell" policy, but his career was seriously disrupted. Clearly AOL should be liable for breaking its contract in a particularly damaging fashion. And the company has come in for stinging criticism, forcing it to take very public steps to reassure customers that such problems won't happen again.

Lawsuits and ostracism aren't good enough for Rotenberg. The AOL case, he says, "shows the shortcomings of contractual solutions. Even with a very clear contract provision detailing when personal information may be disclosed, the Navy investigator was still able to obtain personal information." It's not clear what new federal law—short of a change in the policy against gays in the military—would have prevented a rogue AOL employee's harmful attempt at "customer service." The AOL case proves only that contract is not foolproof, which makes it no worse than any other legal system.

To Rotenberg, however, that horror story is a convenient prop to justify restricting the sale of marketing information—a completely unrelated matter—and establishing a federal privacy agency. Instead of permitting diversity, choice, and enforceable contracts, he and other "privacy advocates" demand that we trust our privacy to the very federal government whose investigator convinced an AOL employee to violate company rules and whose policy forces gay service members to assume false public identities.

In his House testimony, Rotenberg tried to wrap his notion of "privacy" in American constitutional law, by quoting a famous dissent by Supreme Court Justice Louis Brandeis. Rotenberg wanted to suggest that spammers, marketing databases, and customized Web ads somehow violate fundamental rights. But Brandeis was making quite a different point. The Constitution's Framers, he wrote, "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of all rights and the right most valued by civilized men."

This right, however, has absolutely nothing to do with infringing other people's freedom to communicate. It is quite explicitly a right *against the government*, enshrined in the Fourth Amendment's protections against search and seizure. It says not that you own every fact about yourself but that the government cannot invade your home, your papers, or your life without giving an awfully good reason.

There are serious privacy issues in cyberspace, issues that go to the heart of such constitutional guarantees; they involve government actions such as wide-ranging subpoenas of database information, misuse of IRS files, or warrantless seizure of private "papers" located not in someone's house or office but on a third party's server. In contrast to commercial transactions, all this information is obtained through coercion, and the government's intentions are not benign. If privacy advocates really want to assuage public fears of Big Brother, they should concentrate on curbing the government's police power, which is exercised without the check of competition, rather than working to suppress commercial speech.

Instead, to achieve their idea of "privacy," activists want to obliterate the freedom to gather information, to communicate, and to contract. They demand "a coherent privacy policy," a single best way for everyone. To enforce this goal, they would give the government greater power over cyberspace—power that will be backed by subpoenas and interrogations, searches and seizures; power that will demand trials and punishment. That is a very strange way to protect the right to be left alone.

A Classic Work on America's Founding

The Lamp of Experience
Whig History and the Intellectual Origins of the American Revolution

By Trevor Colbourn

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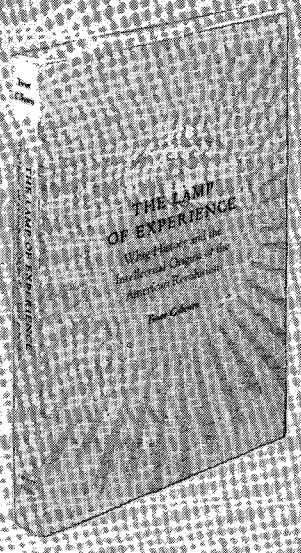
—Lucius F. Ellsworth



In a landmark work, a leading scholar of the eighteenth century examines the ways in which an understanding of the nature of history influenced the thinking of the founding fathers. As Jack P. Greene has observed, "[The Whig] conception saw the past as a continual struggle between liberty and virtue on one hand and arbitrary power and corruption on the other." Many founders found in this intellectual tradition what Josiah Quincy, Jr., called the "true old English liberty," and it was this Whig tradition—this conception of liberty—that the champions of American independence and the crafters of the new republic sought to perpetuate. Colbourn supports his thesis—that "[I]ndependence was in large measure the product of the historical concepts of the men who made it"—by documenting what books were read most widely by the founding generation. He also cites diaries, personal correspondence, newspapers, and legislative records.

Trevor Colbourn is President Emeritus of the University of Central Florida.

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Blame Society First

Individual responsibility is the truly unthinkable.

By Brian Doherty

An individual, or small group of individuals, commits a heinous act. The first reaction on the part of our nation's political and intellectual classes: Blame everyone else.

The Jonesboro tragedy is a case in point. A couple of kids commit an act of shocking villainy: summoning a group of their helpless schoolmates outside and shooting at them—aiming mostly, it appears, at girls. Five people are dead, 11 wounded.

Arkansas Gov. Mike Huckabee steps forward to publicly re-establish the modern moral order. He doesn't declare these kids an aberration, outside the pale of our society, deserving punishment. Instead, he declares them in essence *representative* of modern American society. "It makes me angry not so much at individual children that have done it as much as angry at a world in which such a thing can happen," Huckabee said the day of the shooting.

Maybe it's something in the feed at the executive mansion in Arkansas. Former Arkansas Gov. Bill Clinton, now president, pulled a similar moral switcheroo during his recent Africa tour of apologies. It was one thing to apologize for slavery, for which the U.S. government he represents bears active responsibility.

But Clinton went a step further: It isn't only the things we do for which we must bear blame, but the things others do. The massacres in Rwanda, seemingly the direct result of mad, bloodthirsty tribal warfare between the Hutus and Tutsis, were, Clinton declared, something for which "the international community" must "bear its share of the responsibility." Evil, then, is not the responsibility of those who practice it; rather, it is the shame of everyone who does not somehow prevent it.

There's something untoward about a mind that will do anything to avoid casting blame on those who have committed atrocities but feels free to profligately spread the blame around on social forces, or "all of us," or the international community, or inanimate objects, or the media. But that mind is everywhere; Huckabee was no aberration. A *USA Today* headline states it baldly: "Who's to blame for school shooting? We all are."

Even if the blame-everyone-else–first impulse makes no discernible moral sense, it makes a great deal of political sense. After all, if only the perpetrators of crimes are to blame for them, then there's nothing much for government to do but nab those perpetrators, hold a trial, and, if a guilty verdict is brought down, impose a punishment.

But if social forces, or guns, or violent TV shows and movies are to blame, then cops and judges aren't enough. We need programs, crusades, and concerted government action to try to change the very nature of our culture and society. We need V-chips, gun control, a revived economy, and new forms of educational indoctrination. And for those things, we need the brave leadership of people like Huckabee and Clinton.

A *Los Angeles Times* headline on reaction to the shooting said it all: "Violent culture, media share blame, experts say." Indeed, who else would say it? The culture of experts demands complicated answers, even if they don't make much sense.

Alternately, evil could be traced to its root cause, the one thing that makes it possible no matter what outside forces are brought to bear: individual choice. But to the experts, it is too simple to say someone has done wrong and must be punished. The tangled web of "social forces" is always there to be pored over, analyzed, charted, and regressed.

Whatever social forces of gun worship, misogyny, and violent entertainment allegedly stewed the brains of the Jonesboro shooters, hundreds of thousands of other young men are exposed to the same influences. Yet only these two boys took guns in hand and started firing at their schoolmates. Depicting social forces as a dominant cause for individual atrocities explains too much, grossly overpredicting the actual amount of perfidy in our world.

The advantage the state takes from blaming social forces for individual mistakes or crimes goes beyond the sort of colorful violence that makes the newspapers. All sorts of social problems for which politicians scramble to find solutions, from single-parent households to drug abuse to long-term welfare dependence, result from the cumulative effects of bad decisions made by individuals—decisions that are never made by everyone in the same social milieu. Avoiding pregnancy, educating oneself, and becoming self-sufficient are within the power of most individuals, no matter the social forces surrounding them. Anger at the world shifts attention from where real change is both needed and possible—in the choices individuals make—and leads instead to further airy plans for state action—even though many of the "negative social forces" in America, from terrible public schools to drug-war–torn streets, are of the state's own making.

Never mind Governor Huckabee and his inchoate anger at the world. Be angry at the kids who did it.

MIKE LUCKOVICH

Chain Heat

Are book superstores a threat to the reading public?

By Nick Gillespie

The next time you go into a book superstore run by Borders or Barnes & Noble—stop to smell more than the gourmet coffee wafting out of the signature espresso bar. Stop to soak up the larger environment: The typical Borders superstore, for instance, stocks about 150,000 different titles and 50,000 music selections (there are videos for sale, as well). The magazine rack boasts about 2,500 different publications. The prices are about as good as they get: 10 percent off the list price of most hardcover books; 30 percent off *New York Times* hardcover bestsellers and other special selections; classroom and volume discounts; remainder bins piled high with books priced low.

There is a special area where kids can run riot, manhandling stuffed animals and pawing through other merchandise, while parents shop at a more-relaxed pace. Most days, the chances are good that there will be live music, an author reading, or some other event. Every day, customers are not merely permitted but actively encouraged to browse, to lounge about in abundant, strategically placed chairs and couches.

Soak all this in. Take a long pull off your double cappuccino and a quick nibble of your chocolate biscotti. And then, in the midst of such a scene, despair—for it all merely proves that "American culture is in jeopardy.... Under the effects of the chains' buying power and economic concentration, it will suffer from a lack of diversity and choice."

That's the official position of the American Booksellers Association, a trade association that represents about 3,500 booksellers nationwide, as articulated by its chief executive officer, Avin Mark Domnitz, in *Publishers Weekly*. In March, the ABA, joined by about two dozen California booksellers, filed an antitrust lawsuit against Borders and Barnes & Noble in the U.S. District Court for Northern California. The suit claims that the superstores are getting from publishers illegal "extra discounts," "special terms," and a "whole range of various [advertising] and 'promotional' terms not provided" to "independent" bookstores.

The ABA and the other plaintiffs are suing Borders and Barnes & Noble under the Robinson-Patman Act, a 1936 federal antitrust statute that forbids "price discrimination," and two similar California state statutes designed to prohibit "unearned" discounts to chain stores. If they prevail—and there is reason to believe that they will—they will gain a permanent injunction against the alleged special treatment, be eligible for triple damages on each violation, and have their legal fees covered by the defendants.

While the ABA's public-relations pitch about the case has focused on public-interest themes—"Independent booksellers bring diversity.... I fear the day when what the public reads is controlled by a few power centers," Domnitz has said—there is a starker economic self-interest motivating the booksellers. Between 1991 and 1996, annual book purchases rose from $20.1 billion to $26.1 billion. But over the same period, independent bookstores' share of the market dropped from 33 percent to 18 percent, while that of national chains grew from 22 percent to 26 percent, in large part due to the growth in superstores. The ABA says preliminary figures for 1995 (the most recent available) show the failure rate for bookstores (about 77 per 10,000) is for the first time higher than the average failure rate for all U.S. retail businesses (about 73 per 10,000).

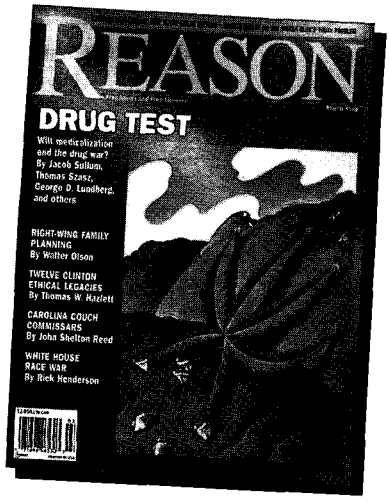
Such tough times make it easy to sympathize with the ABA and its "independent" allies, at least up to the point where they pursue remedies that will ultimately punish consumers. The Robinson-Patman Act, which mandates that any difference in prices offered to different buyers must be "economically justified" and extended to all buyers on a proportional basis, has rarely been confused with customer-protection legislation. As economist Paul Samuelson, a Nobel laureate and a proponent of antitrust legislation, has written, "Instead of concentrating on bringing [prices] down for the consumer, it concentrates on keeping many firms in business, even though some may be inefficient."

Indeed, the ABA has mastered the doublespeak of Robinson-Patman, which seeks to preserve competition by banning it. As ABA president Barbara Bonds Thomas put it in a press release, "If everyone was doing business in the same way, then there would be room for competition." Of course, if everyone was doing business in the same way, the ABA's much-vaunted diversity would cease to exist.

Similarly confused is the ABA's insistence that the vast selection Borders and Barnes & Noble stores offer is solely a function of competition with independent booksellers. Such an analysis ignores completely the role of consumer demand which, one presumes, is the major reason why bookstores, whether "corporate" or "independent," sell anything other than bestsellers (or, for that matter, sell books in the first place). It also ignores two of the major trends in retailing over the past two decades, both of which illustrate how consumer demand creates marketplace diversity. The first is the emergence of "category killers," stores that try to stock every possible product in market segments ranging from books to toys to home furnishings. The other is the near ubiquity of highly specialized niche boutiques that cater to rarefied tastes in goods such as coffee, personal-care products, and cigars.

Despite the economic or philosophical strength of its case, however, the ABA's chances look good. In Robinson-Patman cases, the courts typically rule that any difference in price is tantamount to "discrimination" and is hence actionable. More to the point, perhaps, in 1995, the ABA won a government consent decree against several publishers it then claimed were giving illegal discounts and other advantages to chains. And in 1997, Penguin Putnam, one of those publishers, agreed to pay the ABA $25 million for failure to comply with the consent decree.

If the ABA does win its current case against Borders and Barnes & Noble, it will have succeeded in its goal of "leveling the playing field." Such an outcome will indeed be a victory for independent bookstore owners, though not necessarily one for the reading public.


REASON
DRUG TEST
Will medicalization end the drug war? By Jacob Sullum, Thomas Szasz, George D. Lundberg, and others
RIGHT-WING FAMILY PLANNING
By Walter Olson
TWELVE CLINTON ETHICAL LEGACIES
By Thomas W. Hazlett
CAROLINA COUCH COMMISSARS
By John Shelton Reed
WHITE HOUSE RAGE WAR
By Rick Henderson

Drug Medicalization

Your symposium about national drug policy ("Drug Trial," March) does a service in arguing for more stress on harm reduction and treatment. I agree. Without legalizing any illicit drug, a great deal can be done to achieve demand reduction by prevention and treatment, and by decriminalizing the small-time user.

Voter initiatives to effectively legalize illicit drugs under the pretext of unproved medical benefits are dangerous. Which drugs should be available for medical purposes is a technical question that voters are not qualified to decide.

To allow that would undercut our system of consumer protection through the Food and Drug Administration. This system, of which America can truly be proud, sets scientific—not ideological—standards to ensure that only safe and efficacious medications can be marketed. Drugs like cocaine and morphine, illicit on the street, are nevertheless classified in Schedule II and are available by prescription for legitimate medical purposes.

If convincing evidence shows a real medical value for marijuana (or its active principle, THC), it will certainly pass FDA scrutiny and will then be reclassified and become part of normal pharmacotherapy. My opposition to these medical marijuana initiatives has nothing to do with marijuana per se, but with a concern for not bypassing the FDA procedure.

Avram Goldstein, M.D.
Professor Emeritus of Pharmacology
Stanford University
Stanford, CA

When discussing whether or not "medicalization" is an appropriate way out of the drug war quagmire, it is helpful to agree first on what the word means. "Medicalization" is defined by many as the approach which treats drug use—or abuse—as a public health problem, rather than a criminal justice concern. This seems like a good starting definition. Consequently, I have trouble referring to both November 1996 initiative victories —Propositions 200 and 215 in Arizona and California, respectively—as "medicalization" initiatives.

In Arizona, voters changed the law to remove jail time as an option for people arrested for using illicit drugs. The voters saw the use of cocaine, heroin, LSD, and other drugs as a "problem" where treatment, as opposed to prison, is the more appropriate governmental response.

In California, however, voters didn't see the use of marijuana as the problem. Rather, they saw medicinal marijuana use as the solution to health problems such as cancer, AIDS, glaucoma, and multiple sclerosis.

As we continue to pass good state legislation and win state initiatives, it will be increasingly important for us to develop a more nuanced drug war vocabulary. We are already having problems with this, as evidenced by the confusion over Initiative 685 in Washington state, which was defeated by the voters in November 1997. Advocates, opponents, and the media still refer to that initiative as a "medical marijuana" initiative. In truth, the "medical marijuana" provision was a subset of the "medical marijuana, heroin, and LSD" section—which included all Schedule I drugs—and this was only a small subset of the entire initiative, which was nearly identical to the Arizona initiative.

This confusion has very real policy consequences. Testifying in favor of medicinal marijuana legislation before the Washington state legislature on January 20, I explained that they should pass the bill because, among other things, the voters strongly support it. The chair of the committee responded by asking why the voters had just rejected Initiative 685. I raised my hands in frustration, explaining that they were two entirely different animals. That bill is now dead.

Let us hope that the public discourse is more informative in the months to come, as Washington state voters will have another opportunity to vote on an initiative—this one a pure medicinal marijuana initiative—in November.

Robert D. Kampia
Executive Director
Marijuana Policy Project
Washington, DC

I read with interest your roundtable in the March REASON. My graduate thesis concerns the use of suspicionless drug testing as a "prevention" and "addict identification" tool. (See www.nevada.edu/home/3/gladd/EPS/thesis.html.)

It remains an article of faith among drug war proponents that illicit drug use equals "abuse" and that users are by definition addicts in need of treatment. Under the Americans With Disabilities Act, if you test positive at work and allow yourself to be labeled an addict and remanded to treatment, you are among a protected minority with respect to "employment discrimination." Should you claim to not have a drug problem, on the other hand, your very dissent likewise "proves" you to be an addict "in denial," and your refusal to submit to treatment renders you summarily terminable.

We recently witnessed the ungainly spectacle of L.A. City Councilman Mike Hernandez running off straight away to "rehab" after being caught in a cocaine sting. Until he was caught he wanted drugs, not "treatment." Thomas Szasz has made this sort of point repeatedly.

Just last week Newt Gingrich was at it again, calling for mandatory drug testing of all college athletes, and demanding that all who test positive be remanded to "treatment." This is an apparently untreatable policy tic.

Bobby Gladd
bgladd@ix.netcom.com

Your roundtable on drug policy reform is a great collection of articles, but there are some aspects of this issue that deserve more attention. One is the fact that—even in the liberal Netherlands—many doctors are ambivalent or plainly unwilling to prescribe methadone, and even more reluctant when it concerns heroin, cocaine, and other illegal psychoactive substances.

Another is the disruptive influence this kind of medicalization has on the patient-doctor relationship, as can be witnessed in many methadone programs around the world. Still, an argument can be made in favor of this kind of medicalization, because it can be an instrument in changing the attitudes of the medical profession and of the general public, and in the development of more rational, nonprohibitionist drug policies.

I discussed this argument in an article in the Dutch medical journal *Medisch Contact* in 1994, which in English translation is titled "The Medicalization of (Problematic) Intoxicant Use and the Medical Provision of Psychoactive Drugs." It can be found online at www.drugtext.nl/articles/freek2.html.

Freek Polak, M.D.
Amsterdam, Netherlands

I have a difficult time understanding the comments of Thomas Szasz regarding the recent drug medicalization initiative that was rejected by voters in the state of Washington. Szasz refers to the World Health Organization's definition of drug abuse as the use of any prohibited drug, and then seems to apply that faulty definition to drug addiction. I agree that drug use is not a disease, but drug addiction most certainly is. Improper diet (which can include the ingestion of drugs) is not a disease either, but it can lead to any number of diseases.

If Szasz is simply pointing out that it would be idiotic to arrest people for possession of drugs and force them into treatment for drug abuse, I have no problem with his reasoning. At the same time, however, it would be more compassionate to force them into treatment than to continue putting them in prison. Does Szasz think the drug war is just going to end overnight?

Carl Olsen
Des Moines, IA

Thomas Szasz replies: I wish to thank Mr. Olsen for his comment. Having a chance to reply gives me an opportunity to clarify some important points.

Mr. Olsen says that drug addiction "most certainly" is a disease. I disagree. Habits—whether deemed bad by others or the self—are not diseases.

Mr. Olsen believes that it is "more compassionate" to force so-called drug abusers to submit to what he calls "treatment" than to imprison them. I disagree. Imposing an indefinite, legally unregulated treatment on a person (especially one who has no disease) is not, ipso facto, more compassionate—meaning, I assume, preferable for the subject—than imposing a finite, legally regulated prison sentence on him. In any case, that choice would have to be made by the subject, an option Mr. Olsen doesn't mention.

Mr. Olsen accepts that forced treatment is a treatment. I do not. In medicine, the law regards treatment without consent as assault and battery. I regard forced "treatment" (rationalized as serving the "patient's" own best interests) as torture disguised and justified as treatment, a contention supported by the 300-year history of the psychiatric holocaust and its denial by the victors who write history. Using the coercive apparatus of the state to force people to submit to the ministrations of doctors of medicine is persecution in the name of health, exactly as using the coercive apparatus of the state to force people to submit to the ministrations of doctors of divinity was persecution in the name of God.

Neither Mr. Olsen nor I knows how the drug war will end, but end it will. We do know that alcohol Prohibition did not end by giving some Americans booze by prescription and others involuntary treatment for booze abuse. I feel confident that drug prohibition will not end by giving some Americans marijuana by prescription and others involuntary treatment for marijuana abuse. Indeed, I fear that compounding the prohibitionist zeal of the drug warriors with the therapeutic zeal of the drug medicalizers will only intensify our flight from reason and responsibility.

Subsidizing the Family

In his article on the Parental Bill of Rights ("Family Planning," March), Walter Olson is as critical of the proposal as George Will and James Q. Wilson are enthusiastic about it. As one of the two authors (along with my son, Grandon) of the Parental Bill concept, I welcome the enthusiasm and take the criticism seriously—alas, more seriously than I believe this particular criticism warrants. Olson's arguments, such as they are, make sense only for a world that no longer exists, certainly not in late 20th-century America.

I could go on at length about dozens of details in Olson's article—for example, I wonder how he feels about the World War II GI Bill of Rights on which our program is ultimately modeled and to which many of his criticisms would equally apply. Let me, however, go directly to the main issues involving this long-since-departed world where his arguments might have some relevance. That world is one in which a) there is a strong interest in the future and especially the future that will be inherited by one's children and grandchildren; and b) governmental policies are either minimal or at least neutral with respect to the institution of the family. I argue that neither of these assumptions is accurate in today's America. The failure of these assumptions is exactly why the Parental Bill program and other similar programs are (unfortunately) necessary.

I have recently written a book on the decline of what was once a very strong interest in the future, *Posterity: Progress, Ideology, and the Decline of the American Family*. In this book, I try to explain why the balance between self and posterity has shifted so sharply in the direction of self

over the past several decades. The notion that, in this very present-minded world of ours, the family can be counted on to give adequate attention to our children—to "regulate itself" as Olson puts it—is largely wishful thinking

Certainly it becomes wishful thinking when we add the second point—the expansion of governmental programs whose main effect, intended or unintended, is to undermine the traditional American family. There are hundreds of examples, one obvious one being the expenditure of billions of dollars in public subsidies for various out-of-home day care arrangements. Olson undoubtedly wishes that such programs did not exist. But they *do* exist, and every indication (for example, Clinton's recent State of the Union message) is that these subsidies will be expanded in the future.

It is very understandable that parents would want these subsidies increased. For despite Olson's open-mindedness about current day care arrangements, there is overwhelming evidence that many, if not most, of them are exceedingly bad for children, especially infants and toddlers. An extensive 1995 study of day care centers reports that *"child care at most centers in the United States is poor to mediocre with almost half of the infants and toddlers in rooms at less than minimal quality"* (italics in original). This report, mind you, came from authors who strongly support an increase in day care subsidies. Olson's view that, once parents recognize that day care is inadequate, they will want to raise their young children themselves, is the exact opposite of the truth. It is almost certain that they will then demand *higher* subsidies so that they can count on so-called "quality" care.

Social Security, Medicare, tax-protected pensions, and similar programs also distort parental choice. The past several decades have seen a dramatic shift in the composition of our labor force: a massive withdrawal of older men and a massive infusion of young mothers. It used to be that the overwhelming majority of 65-year-old men remained in the labor force; now only a small fraction do. Similarly, it used to be that only a small fraction of mothers with children under 6 in intact families were in the labor force; now two-thirds are.

Thus, the main drift of the Parental Bill of Rights program would be to shift subsidies from retirement years to young parenting years. It is an extraordinary misapplication of public funds when we heavily subsidize older men so that they can retire earlier than ever when they are living much longer and when work in the service economy is much easier on the elderly than in the past.

I agree with Olson in being for a general reduction of government programs that impact the institution of the family. Most such programs tend to undermine the family, not strengthen it. However, I do not believe that governmental action is by any means the sole cause of American family decline. Rather, I would suggest that this governmental action is, to a great degree, a reflection of the same underlying cultural attitudes that are weakening the family on their own. Were these cultural attitudes to change, there would probably be no need for a Parental Bill of Rights or any other significant government intervention in this area.

But that world does not exist now. Until it does, it seems to me that we must try to support all efforts to increase the care and attention parents give to their children and to raise the flag of "family values" (that abused term!) whenever we can. This is exactly what the Parental Bill of Rights would attempt to do.

Richard T. Gill
Ft. Lauderdale, FL

Walter Olson replies: One extraordinary, and highly unconservative, premise underlies the mass of prolix condescension that here issues from Mr. Gill's pen. Human nature, he contends, has in our own times undergone a radical change, with the result that ordinary middle-class parents no longer care overmuch about the future that faces their children. (The world in which they once did care, his second paragraph announces, is "long since departed.") I find this premise unlikely in itself, inconsistent with both the behavior and the expressed sentiments of nearly all middle-class (or, for that matter, poor) parents I see around me, and at odds with survey data concerning what adults worry about and what motivates them to work overtime, move to suburbs distant from their work, give up leisure time, or forgo present consumption.

Nowhere in his long letter does Mr. Gill respond to my prediction that steeply subsidizing later college education for mothers who stay home with children would cause many to postpone college attendance strategically to take advantage of the subsidy; would unfairly penalize taxpayers who decline to arrange their lives in the prescribed patterns (including women who persist in the now-common pattern of postponing childbearing until they finish their education); and would actually encourage some illegitimacies (if subsidies were made available to out-of-wedlock mothers, as is apparently contemplated). I hope this doesn't mean that Mr. Gill has not devoted much thought to whether these results will occur, or that he does not much care.

As for the facile invocation of the GI Bill to justify any ill-conceived social program that one might come up with, I can only say that, yes, I do see a very real difference (as regards the sorts of public services that might engender a claim on the taxpayer fisc) between being conscripted and sent into the Battle of the Bulge on one hand and looking after one's own child on the other.

Law vs. Law

While generously applauding Steven Landsburg's remarkable book, *Fair Play*, Nicholas Schulz criticizes Landsburg's call to disobey bad laws. ("Out of the Mouths of Babes," March.) Schulz is particularly worried about Landsburg's proposal to teach children "that all laws are

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bad" as well as Landsburg's admonition that the attorney general should be someone who "believes that bad laws are bad and should be ignored."

Landsburg's advocacy of solipsistic lawlessness is only apparent. This confusion is caused by our regrettable habit (slipped into by Landsburg) of equating government dictates—especially statutes—with law. But law and statutes are entirely different things. Genuine law grows spontaneously out of the decentralized interactions of countless people.

This "common law" must be discovered in the actual practices of those affected—such as how commercial law grew through the centuries not from governments but from the actual practices of merchants. Government can no more centrally plan the law than it can centrally plan industrial outputs and prices. Attempts at either sort of central planning generate perverse results.

Statutes, in contrast to genuine law, are almost always arbitrary commands imposed upon citizens by the sovereign with threats of violence. That the sovereign is elected by a majority of voting citizens does little to render more law-like that sovereign's statutory commands. Legal central planning, like economic central planning, is no less absurd when practiced by democratic governments than when it is practiced by totalitarian thugs.

Landsburg is correct if he is read—as I think he should be read—to say that statutes are often bad, and that any decent attorney general should refuse to enforce bad statutes. Indeed, because modern legislatures are largely in the business of supplanting spontaneously evolved law with statutes, refusing to enforce bad statutes may well be an exercise in upholding the law.

Donald J. Boudreaux
President
Foundation for Economic Education
Irvington-on-Hudson, NY

CORRECTIONS

In "Slick Character" (April), the date of the shipwreck of the Exxon *Valdez* was misstated. The ship ran aground on March 24, 1989.

Where do you look for Liberty?

People once turned to the ACLU when government violated their rights. But no longer. As that group fights to create a "right" to welfare, to preserve racial preferences, and to kill school choice, people increasingly seek a principled alternative that will protect individual liberty, not expand government.

If you support individual liberty, free-market solutions and limited government, look to liberty's new address -- the Institute for Justice.

The Institute for Justice is America's premier libertarian law firm. *The Wall Street Journal* calls IJ and our clients "the new civil rights activists." We are in courts of law and the court of public opinion nationwide litigating on behalf of individuals whose most basic rights are denied by the State.

The Institute for Justice is what a civil liberties law firm *should* be. Isn't it time you took a look at an organization that's in court on behalf of your rights?

IJ

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Evil Clown

By Jacob Sullum

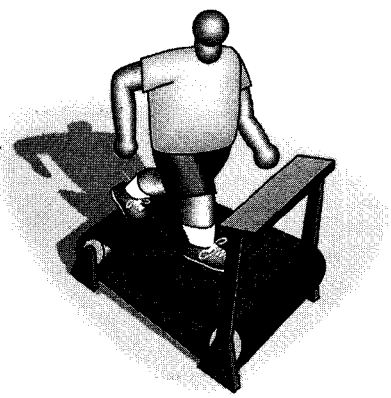
Now that Joe Camel has retired, public health specialists have found a new symbol of evil: Ronald McDonald. Once dismissed as a joke, the idea that the government should treat gluttony and sloth the way it treats smoking may soon be taken for granted.

Consider an article in the *Journal of the National Cancer Institute*'s March 18 issue. Under the headline "Lessons from the Tobacco Wars Edify Nutrition War Tactics," the *JNCI* reports that "advocates of improved diet and exercise for better cancer prevention" are seeking "community level efforts and government policy changes" aimed at encouraging us to eat our vegetables and get off our fat asses once in a while.

"Lifestyle decisions are up to the individual," says nutrition researcher Laurence N. Kolonel, "but the environment in which the individual is functioning needs to help support that." In particular, Kolonel and his colleagues would like to see mandatory physical education and nutritional instruction in school, coupled with "federal funds to create accessible sites for physical activity."

Some who worry about how we stuff our faces have also recommended a tax on junk food and censorship of nutritionally incorrect ads. (See "Dining Fine," Citings, April.) "Just like tobacco," the *JNCI* ominously observes, "junk food and processed foods are produced by a huge industry intent on selling its products." It notes that McDonald's alone spends $599 million a year on advertising.

The article suggests that we are ill-equipped to resist such blandishments: "Although two-thirds of adults think it's very important to choose a diet with plenty of vegetables and fruits, consumption of these foods has increased only slightly since the late 1970s....90% of adults believe it's important to maintain a healthy weight, but 40% think they consume too many calories." The American people are sending a clear message: Stop us before we eat again.



Head Count

By Rick Henderson

"Acceptance of Blacks, Latinos to UC Plunges," blared the *Los Angeles Times* in a front-page headline April 1. *The New York Times, Washington Post, USA Today*, and scores of other newspapers similarly reported statistics released by the University of California for the fall freshman class, the first group of students admitted since the system abandoned racial preferences. UC-Berkeley has admitted 66 percent fewer African-American students and 53 percent fewer Latino students to the class of 2002. At UCLA, the drop in African-American and Latino freshmen was 43 percent and 33 percent, respectively.

But figures released by the University of California system the following day tell a more nuanced story: Overall enrollment of self-identified minority students throughout the eight-campus system did fall, but not so drastically. The UC system as a whole admitted 18 percent fewer African Americans and 7 percent fewer Latinos this year than last year overall.

These statistics, reported in the *Sacramento Bee*, probably understate the number of "minority" students who were actually accepted at a UC campus. One in seven of this fall's applicants—14.3 percent—refused to state their ethnicity, nearly three times as many as last year. And since the UC system, which will admit nearly 45,000 freshmen this fall, guarantees a slot at some campus to any student who meets minimum academic standards, as many as 4,000 additional students who had not been accepted as of April 1 remain eligible to enroll.

Balance Sheet

By Rick Henderson

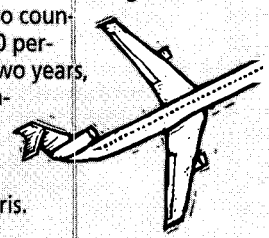
ASSETS

▲ **Equality Time.** California Gov. Pete Wilson ends race- and gender-based contracting in the Golden State. A March 10 executive order ends all goals and preferences for awarding construction contracts to firms that are owned by women or members of racial minorities. Contracts awarded after March 10 were scrapped and will be rebid "solely on the basis of the individual merits of the bid."

▲ **Bottoms Up.** Raise your glasses, federalists: Congress temporarily refuses to tighten the national standard for drunk driving. A proposal to cut federal highway funds to states that don't cut their blood-alcohol threshold to 0.08 percent is excluded from the House version of the highway bill.

▲ **Tube Triumph.** The Federal Communications Commission rules that personal computers aren't TV sets (duh) and can't be forced to incorporate V-chips in their circuitry. The ruling also ends the prospect that the FCC would try to impose sex, language, or violence ratings on the Internet.

▲ **Flight Upgrades.** The United States and France agree to deregulate air travel between the two countries. Passenger flights will expand by 40 percent in June, price controls will end in two years, and the frequency of flights will be completely set by consumer demand within five years. Shipping to Europe should also get cheaper, as the agreement lets FedEx dramatically expand its hub in Paris.



Tough Cops

By Brian Doherty

It's a tough job, being an armed officer of the federal government. But some agencies have it harder than others. And it's not necessarily the ones you might think.

In January, the Department of Justice released figures on the number of assaults from 1991 to 1995 on

▼ **System Crash.** As if Microsoft didn't have enough trouble with the feds, 11 states prepare to bring antitrust actions against the software giant. (See "Creative Insecurity," January.) California, New York, and Texas are among the states pushing the Justice Department to sock Microsoft before it releases Windows 98.

▼ **Illegal Fees.** Are Bill Clinton's pecadilloes lightening your wallet? Sen. Ben Nighthorse Campbell (R-Colo.) says the White House counsel's staff has expanded from four in 1993 to as many as 100 today. Campbell claims the office illegally uses tax money to perform personal legal work for the Clintons. The White House concedes that 19 attorneys work full time in the counsel's office and additional lawyers are "on loan" from other federal agencies.

▼ **Fright Night.** Better get that Freddy Krueger costume out of mothballs: A bill sponsored by Sen. Al D'Amato (R-N.Y.) would reclassify imported Halloween costumes as wearing apparel, subjecting them to punitive tariffs. The bill would give a near-monopoly to Long Island–based Rubie Costumes Co., the nation's largest maker of under–$15 outfits.

▼ **Tribal Thunder.** Cleveland Indians owner Richard Jacobs hopes to raise more than $60 million by selling shares of stock in baseball's most profitable franchise. But Jacobs, who will retain 99.9 percent of the voting shares, will use none of this money to pay down the debt on the taxpayer-financed Jacobs Field, which has cost the locals more than $200 million.

LIABILITIES

federal officers who carry firearms and have arrest authority. As you might imagine, given the nature of their tasks and the criminal elements they contend with, the Bureau of Alcohol, Tobacco, and Firearms and the Drug Enforcement Administration were numbers two and three in number of assaults per 1,000 officers.

But number one might surprise you: the National Park Service, with 51.9 assaults per 1,000 officers—close to twice the rate for number-two BATF (29.6). The U.S. Secret Service and the FBI trailed far behind with rates of 14.5 and 3.5 per 1,000 respectively.

The National Park Service won't comment on why it has the highest assault rate. But a Justice Department spokesman has an explanation that suggests America's park goers may not be as well-mannered as its drug dealers and bootleggers: "I would imagine it's because the National Park Service has the most direct contact with the public," the spokesman says. "I imagine they have to approach the most people in public situations where they might be drunk and unruly."

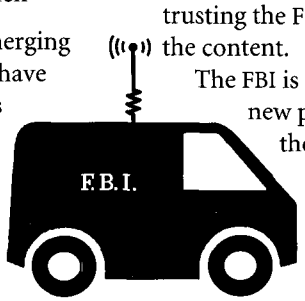
Listening In

By Michael W. Lynch

Once again, emerging technologies have placed the interests of law enforcers and privacy-loving individuals at loggerheads. In 1994 Congress passed the Communications Assistance for Law Enforcement Act (CALEA), requiring telecommunication companies to work with the FBI to ensure that digital telephones neither eroded nor expanded law enforcement's ability to wiretap America's calls. It didn't take long, however, for the FBI to use this new law to expand its eavesdropping capabilities.

Traditionally, the law has distinguished between call identifying information (the number someone is calling), and the content of the call. For law enforcement officials to obtain the number being called, they must meet only the "relevance standard," convincing a judge that the information they seek is relevant to an ongoing investigation. Any actual conversations, however, are fully protected by the Fourth Amendment; before legally listening in, law enforcers must obtain a warrant based on a "probable cause" belief that the target is engaged in criminal activity.

New technology blurs this distinction, delivering packets of information in which identifying information and content are intertwined. Congress intended to preserve the traditional distinction with technology that would continue to separate telephone numbers from actual conversations. But industry representatives have decided to deliver both the identifier and content based on the relevance standard, trusting the FBI to sort out the content.



The FBI is also seeking new powers, such as the ability to track the location of cellular phone users, eavesdrop on con- ▶

QUOTES

"Just when we are moving to an ever greater validation of the sacredness of the individual person, our capacity to imagine a social fabric that would hold individuals together is vanishing. This is in part because [our] religious individualism is linked to an economic individualism which, ironically, knows nothing of the sacredness of the individual. Its only standard is money, and the only thing more sacred than money is—more money."
—UC-Berkeley sociologist Robert Bellah, quoted by *Washington Post* columnist William Raspberry, April 10

"[I]t's free-market conservatives who are the closest thing to Marxists on the scene today. Like Marxists, they believe they have found the 'answer' to the economic puzzles of our time.

"The intellectual arrogance is stunning and, as it did with Marxists, that arrogance leaves zealots willing to make people suffer for their cause. Yes, NAFTA might throw you out of work and ruin your life, they say, but in the long term it's for the best—trust us, we have a theory."
—Jay Stanley, in a letter to the editor of *The Washington Post*, April 4

BRICKBATS

♦ The Labor Department says 28 percent of all federal worker's compensation claims are filed by Postal Service workers. Granted, postal work can be dangerous. But recent investigations indicate a bit of fraud going on. In San Juan, Puerto Rico, investigators followed one man claiming total disability in his ankle and knee. The man may have been unable to work in the post office, but he was able to operate a tae kwon do school, where he was seen breaking boards with his feet. Another postal worker who had been collecting disability pay since 1985 claimed he was unable to lift more than 10 or 20 pounds. He was caught in a gym bench-pressing 235.

♦ Members of the European Parliament will never have to wait in line for a bathroom stall. Each has his own private bathroom, complete with shower. The bathrooms cost $14,790 each.

♦ About 30 years ago, the military wanted a direct route for moving forces from one side of the Hawaiian island of Oahu to the other. So construction began in the early '70s on the H-3 freeway. With the end of the Cold War, the military no longer needed the highway, but building continued. Finally, 25 years late and 18 times more expensive than planned, the 16-mile, four-lane freeway was finished at a total cost of $1.3 billion. State officials say the new highway will alleviate traffic jams, but critics say that's unlikely: The road really doesn't go anywhere anyone wants to go.

Henry Payne

ference calls even after the suspect under surveillance has hung up, and monitor the content of a suspect's voicemail box.

The deadline for CALEA's implementation, October 1998, clearly can't be met because the technology to deliver numbers and content isn't yet available and may take as long as 18 months to develop and deploy.

With negotiations between the FBI, industry representatives, and privacy groups at a standstill, the parties have asked the Federal Communications Commission to settle the dispute. The FCC now plans to start a "rule making" proceeding that will develop regulatory standards for digital telephones and establish a timeline for compliance with the law. The FBI wants the FCC to issue the final regulations by the original deadline this October. But a source close to the negotiations says this won't happen, since the feds and technology firms have been at an impasse for more than four years and neither side appears likely to give in.

Youthful Exuberance

By Nick Gillespie

Between 1978 and 1993, the rate at which adults were arrested for murder declined by about 7 percent, while the rate for juveniles skyrocketed by 177 percent. Some prominent criminologists, such as John DiIulio and James Q. Wilson, believe the huge increase among juvenile criminals reflects the rise of "super-predators," a new breed of sociopathic kids who are qualitatively different from past generations of offenders.

In "Juvenile Crime and Punishment," a recent National Bureau of Economic Research working paper, Harvard University's Steven D. Levitt suggests an alternative explanation for the boom in adolescent anarchy: It reflects "a rational...response to a change in the relative incentives for juveniles and adults to engage in criminal activities." Levitt notes that over the past two decades the adult prison population tripled, while juvenile lockups failed to keep pace. Since kids were more likely to get away with crime, he suggests, they were more likely to engage in it.

Levitt calculates that the ratio of adult state and federal prisoners to violent crimes committed by adults, a "rough proxy" for the severity of the criminal justice system, rose from 0.34 to

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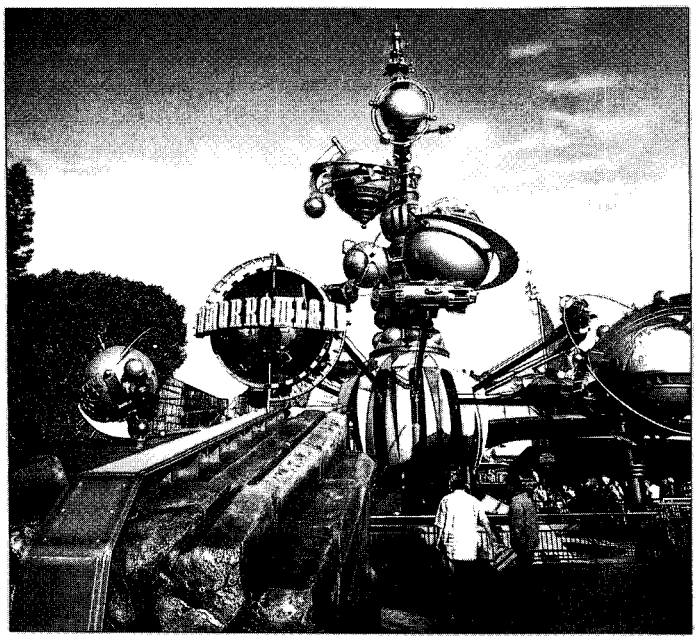


© DISNEY

The Search for Tomorrow

In late May, Disneyland will open its third revamped Tomorrowland. Gone is the hard edge of 1950s modernism. The new Tomorrowland draws on the visions of Jules Verne and Leonardo da Vinci; its buildings are decorated in lush jewel tones; its gardens are filled with fruit trees. (Tomorrowland does still have spaceships; the new Rocket Rods ride is the fastest in the park.)

Social critics have been quick to see Tomorrowland's most recent changes as proof that progress is a fantasy and technology suspect. The cultural critic Tim Appelo declares that Disney's "Imagineers know we're scared of the future....[T]he old Disney dream of erecting a futuristic techno-paradise is dead."

Giving up "techno-paradise" doesn't mean giving up technology or optimism, however. It means letting the future evolve to suit what people want. Contrary to 1950s planners, the real people who buy Disneyland tickets don't want to live in generic high-rise apartments and walk their dogs on treadmills. And Tomorrowland has always emulated the evolving future: constantly under revision, to incorporate new information and please changing tastes. The great thing about the park, said Walt Disney, was that it "will never be finished....It's alive."

—Virginia Postrel

0.55, an increase of over 60 percent, from 1978 to 1993. The corresponding ratio for young offenders, however, declined from 0.36 to 0.29. Juvenile punishments, concludes Levitt, "were comparable to adult punishments in 1978, but were only about half as severe in 1993."

Levitt notes that in states where adult offenders are much more likely to be imprisoned than juveniles, violent crime rates drop by 25 percent when a cohort becomes a legal adult. Far from indicating a new breed of "super-predator," such findings suggest that young criminals—like their older counterparts—can be deterred by the threat of doing time.

Puff Daddies

By Rick Henderson

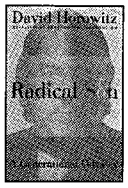
"This is the first act of civil disobedience in my life," laughed comedian and nonsmoker Drew Carey, as he lit a cigarette in the popular West Hollywood restaurant Barney's Beanery March 31. "Lock me up."

Before a crush of microphones, cameras, reporters, and fellow protesters, the stand-up comic and ABC sitcom star publicly flouted the ban on smoking in bars and restaurants that took effect in California January 1. The event, which also promoted REASON Senior Editor Jacob Sullum's new book *For Your Own Good: The Anti-Smoking Movement and the Tyranny of Public Health,* attracted lots of press attention. *Entertainment Tonight, Access Hollywood,* CNN, VH-1, and E! Entertainment News sent camera crews and correspondents, as did the local network affiliates and two independent stations.

"I want to have the right myself to ostracize [smokers], I don't want the government to do it," said magician/comedian/nonsmoker Penn Jillette, who took a drag from a bystander's cigar. Print reporters from *USA Today,* the Associated Press, *Daily Variety,* and *Hollywood Reporter* covered the smoke-in, as did *Los Angeles Times* columnist Mike Downey. Along with the camera crews and reporters, two other stars of *The Drew Carey Show*—Ryan Stiles (Lewis) and Nan Martin (Mrs. Louder)—and about two dozen grassroots protesters joined the smoke-in.

JEFF WILSON

Erwin Held, owner of Barney's, gladly hosted the event because he says the ban has reduced his business by 30 percent to 40 percent. This loss of commerce doesn't seem to bother West Hollywood Mayor Steve Martin (not the actor), who said he was "disappointed" in the positive publicity Carey and his fellow scofflaws attracted. "The ban is here to stay," Martin said. "The government is looking out for the majority, and the smoking ban makes good sense for the majority." ▶



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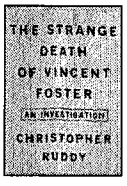

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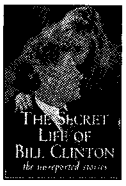

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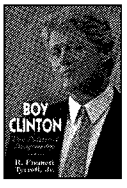

Boy Clinton

Blockbuster exposé by the publisher of *The American Spectator.* R. Emmett Tyrrell has unearthed the truth about the real Bill Clinton. "...served up with Tyrrell's trademark biting wit, and explained in the context of our cultural crackup..." —*Robert Novak*

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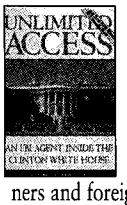

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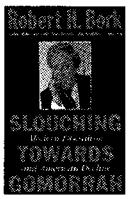

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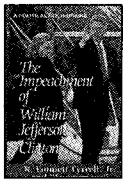

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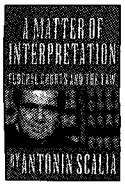

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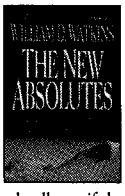

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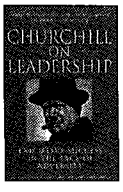

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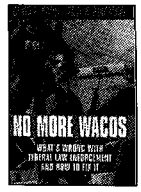

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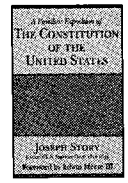

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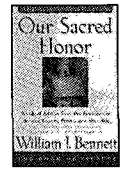

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BRICKBATS

◆ Iowa lawmakers had to rewrite a law aimed at stopping prostitution and cruising at highway rest stops. They originally made it illegal to have sexual contact at any public facility. After they passed the law, someone figured out that the governor's mansion was a public facility, and if the governor and his wife ever had sex, they'd face a year in prison for each, uh, encounter.

◆ When she heard about a local unusual pet contest, Mary Jane Clifton of Circleville, Ohio, decided to enter her pet squirrel Angele. Sure enough, Angele took the prize and got her photo in the paper. The Ohio Division of Wildlife saw the photo and ordered Clifton to turn over the animal. She refused and was charged with illegal possession of wild game.

◆ First the good news: A Freedom Forum poll found 93 percent of Americans would vote to ratify the First Amendment today, and 90 percent said people should have the right to express unpopular opinions. But 75 percent didn't think public speech that might be offensive to racial groups should be allowed. And 53 percent said people shouldn't display art that some might find offensive. Forty-seven percent wouldn't allow songs with distasteful lyrics. And 42 percent wouldn't allow tobacco advertising.

◆ In New Jersey, the Rev. Edward Smart is trying to get the Miller Brewing Co. to stop airing a commercial showing beer-drinking angels. Smart says there is no beer in heaven.

Chip Bok

I'M WORRIED THE PUBLIC MIGHT GET DISTRACTED BY THE F.B.I. FILES, THE TRAVEL OFFICE, AND THE OBSTRUCTION OF JUSTICE STUFF... BETTER SEND ME ANOTHER BIMBO.
BOK REASON 98

Help Wanted

By Michael W. Lynch

Immigration advocates breathed a sigh of relief when new restrictions failed to pass Congress in 1996. But there is a recurring problem in America's immigration policy: not enough immigrants.

American-educated foreigners who get H1-B visas are able to work in this country for as long as six years. Under this program, companies can sponsor foreign professional workers to fill jobs

for which Americans are in short supply. In recent years, firms in such industries as aeronautics, automobile manufacturing, biotechnology, pharmaceuticals, and computers have used the H1-B program to hire foreign graduates of America's most prestigious science and technology programs.

The annual quota of 65,000 H1-B visas was filled on August 29 of last year, a full month before the fiscal year ended. (See "Limits to Growth," Citings, November 1997.) The continually expanding economy may cause this year's cap to be reached as early as May, leaving firms unable to bring on any new employees during the traditionally active summer hiring season.

Congress may keep the high-tech hiring halls open. Senate Immigration Subcommittee Chairman Spencer Abraham (R-Mich.) is offering relief with his American Competitiveness Act, which would increase the annual visa quota to approximately 90,000. And to address concerns that the United States can't produce its own talent, the bill would create 20,000 new math, engineering, and computer-science scholarships for low-income students, throw another $10 million at job training programs, and increase the penalties for companies that violate the program's regulations. Abraham's bill was expected to pass his committee in April.

In the House, Rep. Lamar Smith (R-Texas), chairman of the immigration subcommittee, planned to introduce a bill to increase the cap.

Deadly Crop

By Jacob Sullum

Thomas Jefferson: statesman, philosopher, drug kingpin.

As anyone who follows the hemp movement knows, our third president grew cannabis on his Virginia farm. Lots of it. According to *Marijuana News*, published by an Ohio chapter of the National Organization for the Reform of Marijuana Laws, in some seasons Jefferson raised more than 100 acres of hemp, which was used to make sailcoth and rigging. With a typical yield of 150 plants per

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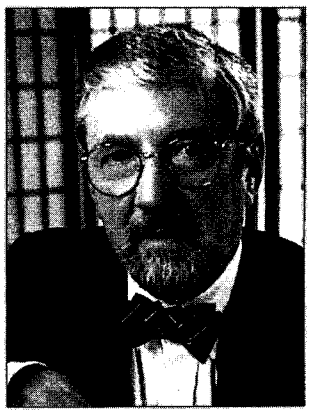
square yard, multiplied by 4,840 square yards per acre, that's more than 70 million plants a year.

Under the 1995 Omnibus Crime Control Act, anyone who cultivates more than 60,000 marijuana plants is a "drug kingpin," subject to execution. In a single year, then, the author of the Declaration of Independence qualified for the death penalty a thousand times over. Noting that the Democratic Party's platform praises the drug kingpin provision, *Marijuana News* concludes, "If Thomas Jefferson were alive today, William Jefferson Clinton would execute him."

SOUNDBITE

Death Watch



In 1990, Oregon resident and Alzheimer's disease sufferer Janet Adkins flew to Michigan and became the first person Dr. Jack Kevorkian publicly assisted in committing suicide. In the wake of her death, her husband, Ron Adkins, became a high-profile spokesman for doctor-assisted suicide and helped pass Oregon's historic 1994 ballot initiative on the matter, the Death with Dignity Act.

Adkins, a business consultant now living in Seattle and an associate with Oregon's Cascade Policy Institute, is speaking out again—this time to protest the inclusion of doctor-assisted suicide on the list of health services provided by the Oregon Health Plan, the state's health care service for the poor and the nation's first system to openly ration and prioritize treatment. REASON Senior Editor Nick Gillespie spoke with Adkins via telephone in late March.

Q: Why do you support doctor-assisted suicide?

A: We're talking about what can be called "rational" suicide; it's not an emotional decision reached during depression or a crisis, but a decision reached after long thought and reflection. Suicide is a right. Of all things, we have the right to make a choice about our own bodies and our own lives. To have the assistance of a doctor, to know that the medication will be adequate, is very important—you want to know that it won't be a botched job, a half job.

Q: So why not include doctor-assisted suicide in the Oregon Health Plan?

A: Because of the nature of the issue. I don't think the Oregon Health Plan should exist in the first place, but beyond that, many people believe suicide is morally wrong. To force them to pay for somebody's suicide is wrong too. If I were opposed to this and my money was being used for it, I would be very upset. Putting the matter in the public sector also gives the opposition carte blanche to attack the whole notion of assisted suicide. Opponents can point to a slippery-slope argument: The right to die turns into a taxpayer duty to help someone die.

Q: What about people who can't afford an assisted suicide?

A: The amount of money for the proper chemicals is so small as to not be worth discussing. Kevorkian doesn't charge for his services; most interested doctors would volunteer their time. Keep it in the private sector. There are plenty of organizations out there, like the Hemlock Society and Oregon's Compassion in Dying, that are ready, willing, and able to help out.

Bottle Battle

By Jacob Sullum

"To learn the health effects of moderate wine consumption," says a label proposed by the Wine Institute, "send for the federal government's *Dietary Guidelines for Americans.*" The label suggested by California's Laurel Glen Winery has a slightly homier tone: "The proud people who made this wine encourage you to consult with your family doctor about the health effects of moderate wine enjoyment."

The labels are bland and uninformative by design. They had to be circumspect enough to pass muster with the Bureau of Alcohol, Tobacco, and Firearms, which has long barred "all therapeutic claims, regardless of their truthfulness," from wine labels, deeming them "inherently misleading." This policy has made it hard for wineries to inform consumers about the evidence that moderate alcohol consumption reduces the risk of cardiovascular disease. (See "Alcohol Blindness," Citings, October 1997.)

The Competitive Enterprise Institute has challenged the BATF's censorship in federal court on First Amendment and statutory grounds, while the Wine Institute and Laurel Glen have taken a more submissive approach. That strategy seemed to pay off in early March, when Treasury Secretary Robert Rubin sent a letter to Sen. Strom Thurmond (R-S.C.) saying the BATF "has made a final determination that the labels do not mislead consumers" and "plans to approve [their] use."

But after Thurmond threatened to introduce a bill that would transfer the authority to review beer, wine, and liquor labels from the BATF to the Food and Drug Administration, the bureau suddenly decided that "no final determinations have been made." Thurmond's press secretary said the senator, who in 1988 sponsored legislation requiring the ▶

BRICKBATS

◆ Tampa, Florida, police fingered Johnny Golden as the suspect in a bank robbery after witnesses picked his photo out of a lineup. Golden produced a pay slip showing he was working in North Carolina when the robbery took place. His supervisor and four other workers also told police he was working on the day the bank was robbed. It didn't help. Golden spent six months in jail awaiting trial. While in jail, Golden lost his car and his home, and his wife took their infant son and moved back in with her parents. On the first day of his trial, the teller he had allegedly robbed walked into court, saw him, and told the prosecutor they had the wrong man. Florida set him free and paid for his bus fare back to North Carolina.

◆ An Iranian court fined Reza Ghanilu $330 for publishing obscenity in his magazine *Fakhur*, or *Thinker*. His crime? He ran photos of Gennifer Flowers, Paula Jones, and Monica Lewinsky—without veils. The court also ordered him to stop publication of the weekly magazine for six months. It isn't clear whether this is a reflection on Iran's medieval legal code or on Bill Clinton's taste in women.

◆ Timothy French robbed a bank in Grand Forks, North Dakota, of $3,400. He might have gotten away but for one mistake. He wrote his holdup note on the back of a pay stub from a firm he'd been working for. The stub had his Social Security number on it, and police tracked him down pretty quickly.

—Charles Oliver

now-familiar surgeon general's warnings on alcoholic beverages, was "absolutely furious that somebody would put language on wine labels that would detract from the message concerning the possible negative health effects of alcohol consumption."

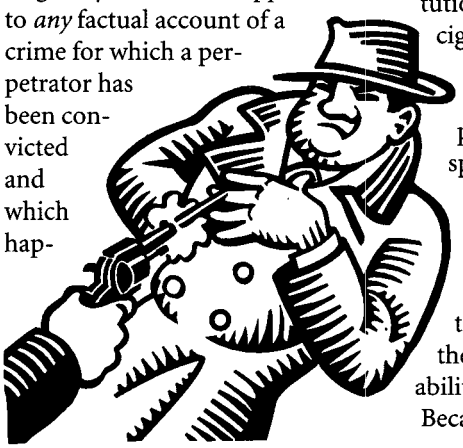
Despite Thurmond's opposition, vintners said they hoped the BATF would ultimately approve the labels. In the meantime, you don't need the senator's permission to consult your doctor, and you can find the *Dietary Guidelines for Americans* at www.usda.gov/fcs/cnpp.htm.

True Crime Tax

By Brian Doherty

A Georgia state legislator, angry at those who profit from the misery caused by violent crime, has proposed a constitutionally suspect remedy: a special surtax on any money made from telling true tales of serious felonies. The tax money would primarily flow into Georgia's Crime Victim Emergency Fund, which victims can apply to for some reimbursement for the effect of crimes.

The bill, which Democratic Georgia state Rep. Chuck Sims calls "The Victims Rights Act of 1998," originally would have applied to *any* factual account of a crime for which a perpetrator has been convicted and which happened within the previous 20 years. In response to heated criticism from local newspapers and First Amendment watchdogs, it was amended to be "inapplicable to factual accounts...reported in any media as news reports or news items."



Even with newspapers specifically excluded, Teresa Nelson of the American Civil Liberties Union of Georgia thinks the law violates the First Amendment. "It's a special tax based on the content of your speech," she says.

Nelson notes that the bill is a roundabout way to Sims's supposed goal: relief for victims. She says the state should instead encourage victims to directly sue criminals for any money they may have, not just the proceeds from accounts of their crimes. "If the inmate sold a book of poetry, this 'Victims Rights Act' wouldn't do anything to help them," Nelson says. And if most of the money goes into the state fund, the victims affected by a specific crime would end up getting pennies on the dollar at best.

Sims thinks all this First Amendment talk is hooey. "You can't tax people writing movies, books, and screenplays? That's a complete fallacy," Sims complains, not granting that taxing written material raises special constitutional issues. "You tax cigarettes, beer, property owners, cattlemen—all those people are hit with specific taxes based on what they do or sell. All writers are taxed the income tax, so why isn't that a detriment to their free speech and ability to write?"

Because of the bad publicity the bill received, Sims didn't put it up for a vote this year, but he intends to push it again in next year's legislative session. "It had lots of bipartisan support this year," he says, "and I think I can get it through."

Reel Dope

By Jacob Sullum

The film *Trainspotting*, released during the 1996 presidential race, became fodder for Bob Dole's desperate attempt to seem tougher on drugs than Bill Clinton. The Dole campaign repeatedly condemned *Trainspotting* as "a movie that glamorizes heroin use."

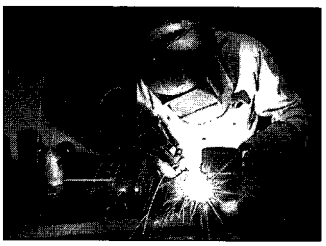
Anyone who actually saw the film had to be puzzled by that claim. The young Scottish heroin addicts portrayed in *Trainspotting* lead lives of hopelessness and degradation: They live in filthy conditions, steal to support their habits, betray friends and relatives, and die of AIDS. In one memorable scene, the protagonist dives into a toilet bowl full of feces to recover an opioid suppository. This is glamorous?

A recent issue of *NIDA Notes*, published by the National Institute on Drug Abuse, reinforces the feeling that Dole may have been missing something. The newsletter reports that NIDA Director Alan Leshner participated in a ceremony at which *Trainspotting* received a Prism Award for "outstanding efforts by the entertainment industry to portray drug abuse and related violence accurately in films and television programs." Of course, this could be just another sign of the Clinton administration's softness on drugs.

Bidding Wars

By Brian J. Taylor

California's political establishment and its grassroots activists just can't get on the same page, especially when they're talking about initiatives on the June 2 primary ballot. At the state Republican convention in January, a vote supporting the anti–bilingual-education "English for the Children" proposal caused an embarrassing rift: Every party leader opposed the measure even though most of the delegates and perhaps 70 percent of voters favor it. In March, Democratic insiders were similarly rebuffed when delegates at their convention rejected a resolution for an initiative drafted by party leaders and public employees unions. The convention featured the unfortunate (for the leaders, that is) theme of Unity.



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Proposition 224, the "Government Cost and Taxpayer Savings Initiative" would require contractors bidding on government engineering, design, and repair projects that amount to more than $50,000 to submit to a process of competitive bidding overseen by the state comptroller, extending a competitive-bidding process that currently applies to new construction projects. The initiative's backers, led by construction and state employees unions, believed they would get unified support from traditional Democratic Party interest groups.

But an unusual alliance of taxpayer advocates, civil rights organizations, local government officials, and the California Teachers Association have publicly attacked the initiative as costly and discriminatory. The taxpayer groups say the initiative could increase taxpayer costs by as much as $1.7 billion a year and require the state to hire 15,000 new employees to do the work; they point out that a state employee group bidding on an engineering contract would have to cite only the incremental cost of hiring new workers to complete the job, while a private engineering firm must include the costs of overhead and other expenses along with their new hires.

Civil rights groups, backed by San Francisco Mayor Willie Brown, contend that many of the state highway engineers who would benefits from the initiative are white; they fear that businesses owned by women and members of racial minorities (especially nonunion firms) would be shut out of the process. Local education officials complain that contracts that have traditionally been bid locally would have to be vetted by the state comptroller, a process that could delay routine repairs for months.

The initiative is opposed by "virtually every school district, water district, dozens of unions, taxpayer groups, and hundreds of cities," says Adrian T. Moore, director of economic studies at the Reason Public Policy Institute, "simply because they don't want to pay the higher cost of using state engineers and architects for every construction project." ◆

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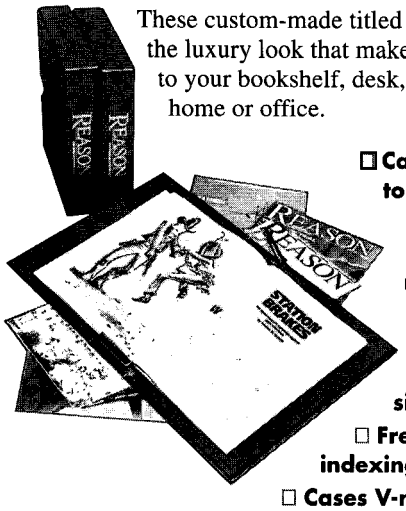

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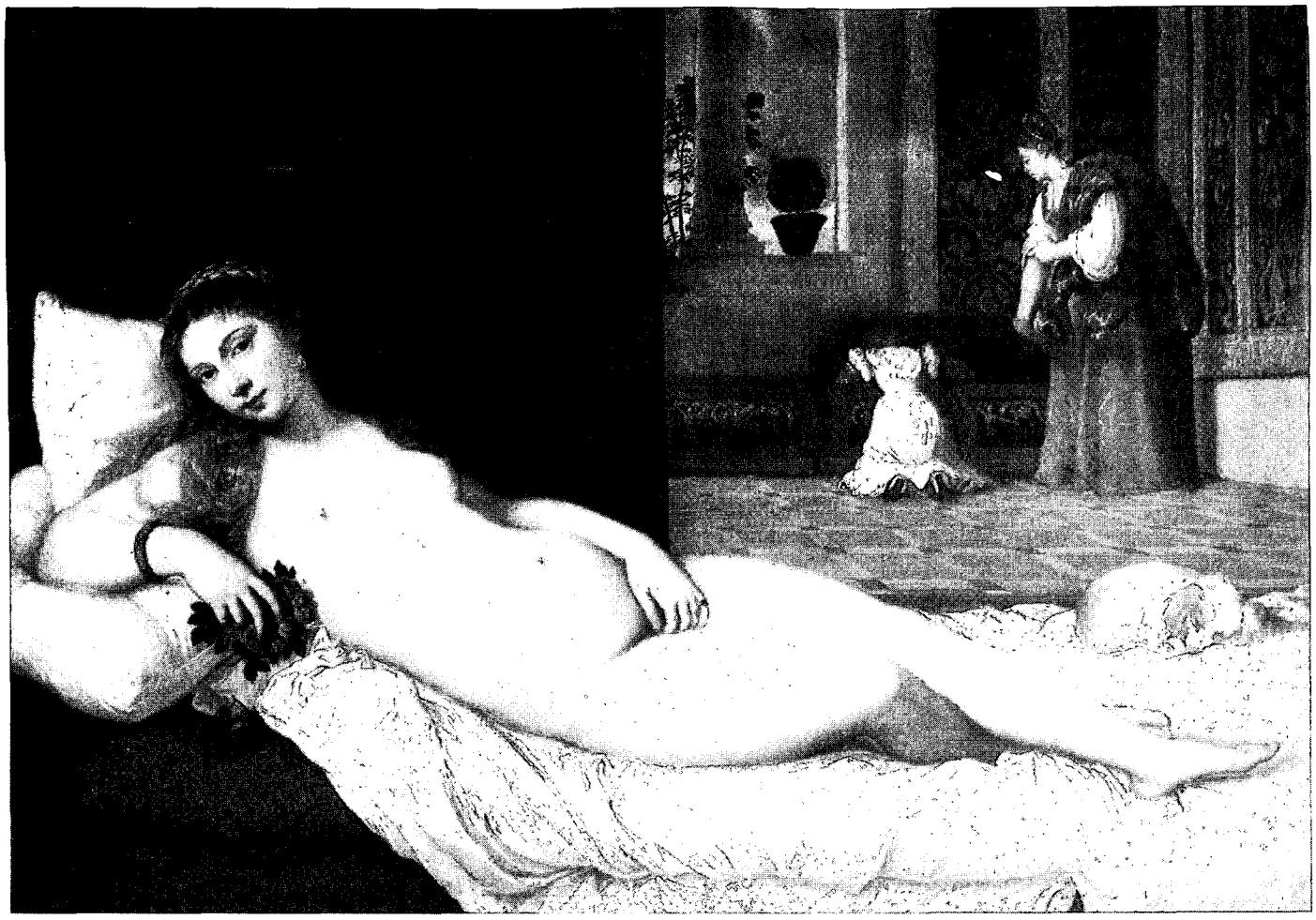
BUYING INTO CULTURE

How commerce cultivates art
By Charles Paul Freund

* * *

UNDRESSED but unabashed, *The Venus of Urbino* has been staring slyly back at her admirers for almost 500 years. Completed by the Venetian master painter Titian in 1538, and frequently cited as one of his two or three greatest achievements, *Venus* was soon clothed by her contemporaries in the flimsiest of classical allusions; in fact, there's almost nothing in the portrait suggestive of the mythology that provides an excuse for its eroticism. Generations of critics and art lovers have, in their turn, covered Titian's goddess in a thick drapery of their own: opaque layers of interpretation and explanation of who she is and what she means. Today she hangs in the Uffizi, one of the great art temples of Florence, at once a symbol of fleshy Renaissance humanism and of the spirit of art that is not of this world. For a woman without clothes, *Venus* has worn a lot of guises.



Naked Truths: Is Titian's *Venus of Urbino* a nod to classical mythology, an expression of "harmonious, faithful love," or the Renaissance equivalent of a *Playboy* centerfold? In exploring the role of commerce and "consumerism" in the development of culture, historian Lisa Jardine notes, such "works of art were painted to meet a vigorous demand for bedroom paintings depicting erotic nudes in salacious poses."

Lately, however, much of this intellectual wrapping is falling away. Emerging from beneath is neither a goddess nor a symbol; nor does the meaning she has been keeping to herself have anything to do with Olympic allegory. Her secret is actually much more interesting, because it is about the forgotten foundations of contemporary culture.

Titian's mythological paintings have drawn a great deal of expert commentary, with people, as usual, seeing what they want to see. Some observers have seen the themes of Latin poetry symbolically expressed, and have turned *Venus* into a literary exercise. Some have placed this painting in the context of Titian's other nudes (he painted many, though this Venus is notably more relaxed than most); the modern aesthete Bernard Berenson pronounced these works to be "truly Dionysiac, Bacchanalian triumphs—the triumph of life over the ghosts that love the gloom and chill and hate the sun." Others have focused on such details as the clump of myrtle Venus clutches, and have interpreted the whole painting from that. In the symbolic language of flowers, myrtle indicates marital fidelity; thus, according to one 1963 interpretation, Titian's work is an expression of "harmonious, faithful love."

Maybe it is. But listen to the account of this painting and its contemporary reception offered by Lisa Jardine in her 1996 history of the Renaissance, *Worldly Goods*: "Titian's canvases of statuesque naked women in recumbent poses were regarded as learnedly symbolic by nineteenth century art historians....Only recently did contemporary correspondence come to light which showed that these works of art were painted to meet a vigorous demand for bedroom paintings depicting erotic nudes in salacious poses. When Guidobaldo, Duke of Urbino, was negotiating to buy the painting now known as *The Venus of Urbino* from Titian in 1538, he referred to it simply as a painting of 'a naked woman'....In 1542, the churchman Cardinal Farnese saw the painting at Guidobaldo's summer residence and rushed off to commission a similarly erotic nude of his own from Titian in Venice. Reporting back on the progress of the painting some time later, the Papal Nuncio in Venice expressed the view that the Cardinal's nude...made *The Venus of Urbino* look like a frigid nun. In 1600, in response to a request from an admirer of *The Venus of Urbino* to acquire a copy, the then Duke agreed, on condition that the identity of the owner of the original be kept a secret—he did not wish it to be widely known that he was the owner of that kind of painting."

That kind of painting? What about the poetry, the symbolism, and the Dionysiac triumph? According to Jardine, a painter's reputation in Titian's time rested "not on some intrinsic

criteria of intellectual worth," but rather "on his ability to arouse commercial interest" in his work.

IT MAY NOT be immediately apparent how radical a judgment this is. After all, that Renaissance culture was deeply interested in the passions is well known. The many paintings of nude women, despite being labelled "Venus" or "Eve," were perceived erotically by their purchasers. Though they are now revered in museums, their original owners often concealed the paintings behind closed curtains, or kept them rolled up and hidden. Many such paintings were probably destroyed when subsequently discovered. But modern students of such work usually examine this phenomenon in light of such specialized interests as the origins of "the pornographic discourse." This has become yet another battlefield of gender studies and sexual identity politics, skirting the central issue of the changing social function of such images.

In recent years, an array of voices has begun to converge from such fields as art, economics, history, and anthropology to re-examine the origins and functions of culture. A number of researchers are, like Lisa Jardine, taking a fresh look at so malevolent a pair of concepts as "commercialization" and "consumption," and reapplying them to cultural activity in unexpected ways.

For that matter, the association of Renaissance cultural genius and accelerating commerce is even more of a commonplace. The sociology of Renaissance art has been well worked over, with critics and historians explaining changes in painterly style and content in terms of a new, social-climbing class, a bourgeois interest in "realism," the status role of patronage, and a variety of similar factors. Scholar Peter Burke, for example, recognized the social and economic process that produced the Renaissance when, in 1972, he demonstrated the significance of the new merchant class that was so quick to patronize new arts. Marx himself argued that such art was shaped more by demand than by supply.

But Jardine is addressing a great deal more than the eroticism of Titian or the commerce that made his patrons rich. She is describing Renaissance painting *itself* as a specifically commercial process. She doesn't deny that its works were shaped by painterly genius; she does believe that such genius expressed itself with an eye on the next commission, and that the paintings reflect both seller and buyer. And not only paintings; Jardine's point in *Worldly Goods* is that the whole of the Renaissance—art, printing, humanist learning, expanding science, etc.—resulted not only from the release of creative genius made possible by increased wealth and learning (itself a consequence of trade), but from the release of human *acquisitiveness* and the ability of genius to address it (or, as appears to be the case in her tale of Titian, actually to pander to it).

Worldly Goods represents Renaissance culture as a process, the dynamic result of an expanding cultural market. In her view, this culture did not merely depend on a material foundation, it was concerned—to an extraordinary degree—with material ends. Her examination of Carlo Crivelli's 1486 painting, *The Annunciation With St. Emidius*, details the work as a display—if not a boast on the part of the city that commissioned it—of highly desirable consumer goods: embroidered clothing, valuable tapestry, imported carpet, carved reading desk, gilded frieze, brass candlestick, leather-bound books, porcelain dishes, majolica pot, crystal vase, terra cotta carvings, earthenware pots, marble floor, and an array of architectural form and detail. One must look closely to find the Holy Spirit in the crowded painting, not to mention a Virgin whom Crivelli depicts as if she were a proto-shopaholic.

Jardine is as unabashed about her argument as *Venus* is about her nakedness. "[T]hose impulses which we today disparage as 'consumerism,'" she writes, must "occupy a respectable place in the characterization of the new Renaissance mind." Here is cultural achievement that does not necessarily seek to transcend the material world; it may do so, but it remains ever rooted in that world. The implications of such an understanding of culture—especially of the culture that undergirds the Western aesthetic heritage—are considerable.

Jardine, who is dean of the faculty of arts at Queen Mary and Westfield College, University of London, is not alone in addressing culture's debt to the material world that provides its structure, in understanding imaginative creativity as a part of a continuing process, and in celebrating culture as a means not only of self-expression, but of pleasure, however both creator and audience agree to define it. But it is not only the appearance of such a vision that is noteworthy; its timing is particularly striking.

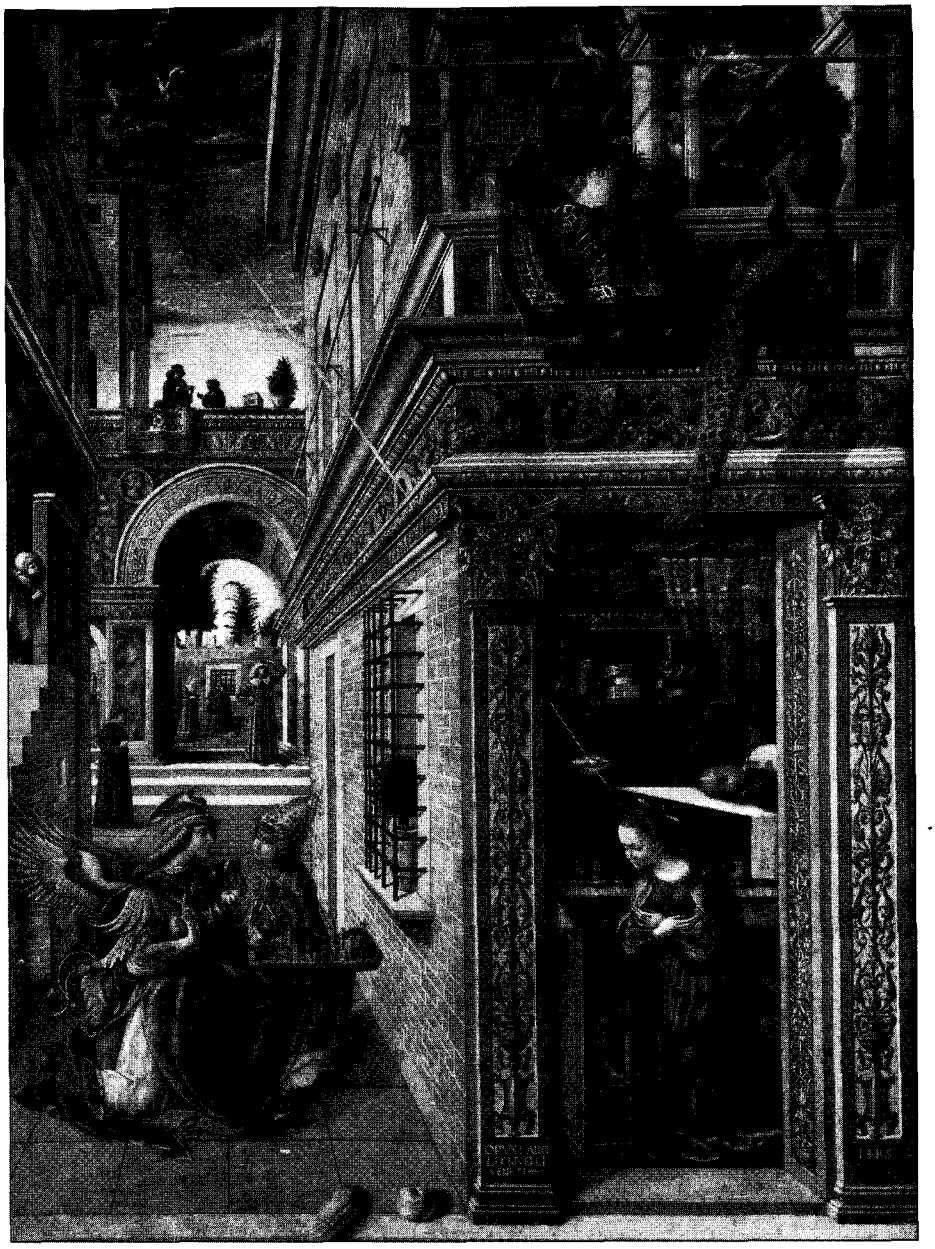
AN AGE OF politics is ending, *The Wall Street Journal* announced in March; a new cultural age has already begun. The paper was inaugurating a new, weekly "Taste" page, to be devoted to cultural controversy, and its introductory remarks were intended as a manifesto. The great ideological struggles of the century have concluded; indeed, argued the *Journal*, the Soviet empire fell not to invading armies, but crumbled under the force of modern culture.

If one takes the meaning of "modern culture" in its broadest sense—the *Journal* defined it as the free decisions of people—then the paper is right on both counts: on the end of history as politics, and on history's renewal as culture.

But there is a real irony in such a transformation, because even as politics recedes, the world of elite culture it is leaving behind is more politicized than it has ever been. Viscerally anti-capitalist, riven by conflicts over gender, class, race, elitism, and identity, the cultural establishment has not only succeeded in suffocating such once-lively forms as poetry and literary fiction by isolating them in institutional settings and severing the vital connection to their readers, it is amusing itself by substituting "simulacra" for reality, and jargonized theories for art and literature.

The world of cultural studies is of course a big one, and many of those shaping it are enlarging and enlivening the concept of culture: The revival of rhetorical studies, the re-examination of the literary canon, the criticism of taste hierarchies, and the attention paid to subcultures have often been insightful and provocative, even if many of these efforts have come to dull and predictable para-Marxist conclusions.

But at the postmodern extreme that has gained widespread institutional ascendancy, some theorists and their disciples have displaced creators and enthroned themselves as the last possible self-expressive seers, at extraordinary cost to their own fields. Much literary and film criticism, for example, is no longer accessible to general readers, and is of no interest to them. Worse, a number of these cultural critics have pronounced history and the soft social sciences—and in some cases the hard sciences, too—to be literary in nature, and therefore ultimately without objective value. Such academic theorizing has become a kind of black hole of human knowledge and achievement, with the result that some vulnerable fields—especially in the social sciences—have approached a state of intellectual collapse.



Attention Shoppers: Carlo Crivelli's *The Annunciation With St. Emidius* (1486) is packed with highly desirable consumer goods—embroidered clothing, valuable tapestry, imported carpet, brass candlestick, leather-bound books, crystal vase, terra cotta carvings, and the like. One must look closely to find the Holy Spirit and the Virgin Mary depicted as a proto-shopaholic.

NATIONAL GALLERY, LONDON / ET ARCHIVE, LONDON / SUPERSTOCK

Even so, the *Journal* is correct, though its view is, unsurprisingly, skewed to the right. "American culture," reads its manifesto, "is at something of a crux," and the paper pauses to welcome signs of what it takes to be a "reassessment" of values. Given the *Journal*'s cultural conservatism, the signs it perceives point toward traditionalist cultural authority; important matters, the *Journal* predicts, are going to turn on matters of "taste." But the cultural future belongs neither to conservative nor liberal authoritarians. A culture driven by personal choice is flourishing, indifferent to elites and divorced from taste hierarchies and the traditional concepts of status and authority that supported them; its proliferating, ever-subdividing groupings are overwhelming the very idea of a cultural mainstream over which the old left and right continue to struggle. These are ultimately the cultural forces that crushed the Soviets, and they are everywhere at work.

In recent years, an array of voices has begun to converge from such fields as art, economics, history, and anthropology to re-examine the origins and functions of culture. A number of researchers are, like Jardine, taking a fresh look at so malevolent a pair of concepts as "commercialization" and "consumption," and reapplying them to cultural activity in unexpected ways.

These thinkers do not constitute a "school" of thought, and do not necessarily agree on many specifics—they do not necessarily admire capitalism, much less commercialism. But they share a significant concern: assessing culture within its material

context, especially the use to which individuals may put that context for self-renewal and even self-creation.

CENTRAL TO THIS emerging concept is a line of thought being developed by Canadian anthropologist Grant McCracken, who has been studying the increasing differentiation in "styles of life." For example, McCracken has noted that only a few years ago there were one or two kinds of "youth culture"; now, as a trip to any large mall will reveal, there are over a dozen (including, at the time he studied them, "goths," "punks," "b-boys," etc.), marked by fashion, hairstyle, body language, music preferences, and an array of other personal choices. Much the same is true, he says, for the elderly, who are far more diverse in type and style than they have ever been; it is true for such gender groups as gays, who used to adhere to a small number of behavioral types, and who have now proliferated into numerous sub-sub-groupings; it is true, he says, for everyone. Music cultures, sports cultures, tech cultures, fan cultures, online cultures, a panoply of long- and short-lived ways of thinking and living are all continually springing into being.

Commercialization and, worse, "commodification" are considered by the contemporary cultural establishment to be the mortal enemies of art, and the antithesis of its spirit. But the fact is that art's great historic opportunities have frequently arisen from intensely commercialized periods, and have often been accompanied—if not set in motion—by periods of explosive acquisitiveness.

McCracken is right. Numerous areas of cultural activity that until recently had gatekeeper-controlled "mainstreams"—popular music, TV, fashion, reading, etc.—have split into a sometimes bewildering variety of subgenres. In his 1997 work, *Plenitude*, McCracken argues that the cultural "fecundity" and "speciation" he is observing is made possible by capitalism. A culture rich in choices is both anti-conformist and liberationist, because it is rich in personal possibilities. People can remake themselves, and experiment with their self-images. "Capitalism has endured, enabled, perhaps provoked the speciation we see around us....It doesn't care what it does. It doesn't care what we do." Capitalism, he writes, "is nothing if not transformational."

McCracken and Jardine are actually telling the same story, though each is describing a different stage of its development. His focus on the present transformational possibilities of capitalism is not only very much related to what Jardine is getting at in her own discussion of Renaissance "acquisitiveness" and "consumerism," it is in fact the end result (so far) of a cultural process that first appears with the Renaissance.

Not only was expanding material well-being a major subject of the art of both 15th- and 16th-century Italy, Jardine argues, it was an essential component of the new Renaissance mentality behind that art. Of course, the growing well-being of the Renaissance is limited to a few classes in a highly stratified world, and is expressing itself in luxuries. But the point is the same: What made the imagery important to those who originally commissioned and displayed it was not only the revolutionary artistry that was developing, but that, ultimately, that imagery was a reflection and a celebration of their new material world, their new worldly interests, and their emerging, individualized selves.

Indeed, an essential point about Renaissance art is that after centuries in which visual imagery was devoted to religious themes in styles and forms specifically dictated by the Church (at the Second Council of Nicaea in the eighth century), art turns its attention to the secular world and begins to invent its own terms. Individual artists begin to be celebrated, and their work demanded. As the German art scholar Hans Belting has put it, this shift is actually the beginning of art as we understand the idea. And that art, which is so greatly admired, would not have existed without the "consumerism," which is so greatly disparaged.

This was not a unique historical coincidence. Though the world of artistic culture exists today on its own terms, with its own tradition and an established discourse that is often very far removed from—and opposed to—material concerns, its anti-material mystification is a modern conceit.

Commercialization and, worse, "commodification" are considered by the contemporary cultural establishment to be the mortal enemies of art, and the antithesis of its spirit. But the fact is that art's great historic opportunities have frequently arisen from intensely commercialized periods, and have often been accompanied—if not set in motion—by periods of explosive acquisitiveness. There is an inescapable connection between the rise of an acquisitive public and the expansion of an audience interested in expressive art, and it is out of that nexus that the recognition of the expressive creator as a visionary artist has developed.

THE CONVERGENCE OF commerce, wealth, and cultural achievement can also be observed in the famous case of 17th-century Holland. The Dutch of that period were extremely innovative shipbuilders, dyers, and farmers, as well as innovative traders, and the result was that their society became immensely rich. What had once been items of luxury, noted Michael North last year in *Art and Commerce in the Dutch Golden Age*, became everyday goods.

Market forces and the innovation they unleashed, argues

North, a German economic historian, had a huge impact on that society's art. For one thing, the traditional relationship between artists and patrons was broken: Instead, "paintings were marketable goods which competed for the attention of the buyer." Art dealers appeared, buying painters' works and commissioning them to do more. In addition, the Dutch invention of tonal painting drove down the costs of producing art and made paintings available to an ever greater proportion of a suddenly art-hungry public.

"[F]or the first time in European history," writes North, "the middle classes also demanded works of art." Whereas the Dutch nobility had often commissioned religious images and allegorical paintings, the recently wealthy middle class had an interest in secular subjects, including themselves, their possessions, their buildings, and the painterly transformation of their familiar landscapes (a secular shift further encouraged by Calvinist iconoclasm). Art spread throughout Dutch society; even peasants had hanging on their walls the work of painters whom we regard today as Dutch Masters.

This same phenomenon played out yet again in 18th-century England, the time and place where our current cultural world was built. Augustan England saw a revolution in the arts. Cultural activity, until that time, had been centered in Europe's aristocratic courts, and shaped by contemplative aristocratic taste. Few artists enjoyed much status, and they performed whatever creative work was commissioned by their noble patrons.

Accelerating trade and industrialization in Britain, however, created a large middle class with increasing money and leisure, and that class was to reorder the cultural world entirely. The arts, especially literature, flourished. The influence of the nobility was annihilated; culture moved from the court to the city, and the system of imitative fine arts as we still know them was developed. Artists, for their part, enjoyed enormously enhanced social status and regard. If the age of art begins with the Renaissance, the age of the artist, as Hans Belting has noted, begins with the Enlightenment.

In the meantime, "[t]here was a consumer boom in England in the eighteenth century," according to the Cambridge economic historian Neil McKendrick, a boom that "reached revolutionary proportions." It was, McKendrick wrote in 1982, "a convulsion of getting and spending" that had never been seen before. "Luxuries" became "decencies"; "decencies" became "necessities"; necessities "underwent a dramatic metamorphosis in style, variety and availability." Goods were everywhere available in unprecedented profusion, and the rising middle class used them not only for convenience and comfort, but to recreate themselves socially and culturally.

Because of the social conditions of the period, a great deal of middle-class energy originally went into emulating the aristocracy by dressing and otherwise attempting to live like them. But inevitably, the middle classes soon became interested in the world they themselves were creating and the types of persons they were becoming. One major result was the explosion of fiction reading and the rise of the English novel. Literature played the same role for industrialization's middle classes that painting had played for the patrons of secular Renaissance art and the Dutch burghers: the aesthetic reflection of a changed people in a changed world.

Interestingly, Neil McKendrick's description of the commercialization of 18th-century society parallels Grant McCracken's description of the present. "[U]nabashed by any sense of plenitude in Nature," McKendrick writes of the 18th century, "men deliberately sought to create new and improved species and exciting novelties with which to delight the eye, to exhibit one's taste and to assert one's wealth."

In Augustan England such speciation was descriptive of the exploding world of goods. But the use to which people have put such goods in two centuries of social, political, and cultural development has been a key factor in allowing McCracken to apply the very same metaphor to society itself. McKendrick's Enlightenment is an urban place in which people draw on the material world to break the bonds of class and status; McCracken's late 20th century, in which wealth is far more widely disseminated, is an individualized place where people draw on their material surroundings to create and recreate aspects of themselves at will.

EVERYBODY AGREES THAT "consumerism" is a modern curse, perhaps *the* modern curse. Clergymen, intellectuals, social critics, environmentalists, artists, politicians, journalists, and pop ascetics of every kind describe it as a vulgar, advertising-driven accumulation of unnecessary junk, and a build-up of debilitating debt. Marxists have explained it in terms of such concepts as "commodity fetishism," "symbolic capital," and, in a still-vital concept formulated by the German Marxist Frankfurt School, "false needs" insinuated by a conspiratorial capitalism. Meaningful lives, the whole world agrees, lie in simple things that cannot be purchased: love, nature, family, and the contemplation of eternal spiritual values.

It is obviously true that happiness lies in such essential concerns, just as it is obvious that in many individual cases, "consumerism" really is little more than a crass reflex often resulting in crippling personal debt. So why is it that, while everybody expresses the heartiest contempt for consumerist behavior, everybody in the world who can do so indulges in it, including most of its critics? There is one complicating factor in the universal condemnation of acquisitiveness: personal liberty, and the opportunity to employ the material world as a tool for self-expression.

What we regard as "consumerist" behavior does not begin with industrialization and the manufacture of cheap, ready-made goods; it can be traced to antiquity. One revealing way to trace its past is through the proclamation through history of so-called sumptuary laws that attempted to control acquisitiveness.

These laws expressly limited the quality of things—clothing, gems, and the like—that any given individual was allowed to own or display. The purpose of such laws was not spiritual; they were not intended to turn anyone's attention to family or nature. Rather, the laws' purpose was to maintain the political and social status quo. These laws preserved despotic distinctions politically by limiting the material display to the hereditary upper classes (or to such professional classes as doctors or professors), and they underscored the effect of poverty psychologically by pre-

venting anyone from expressing their individuality except in ways allowed by tradition. Urban classes either wore or owned what they were supposed to, or faced punishment. (Pre-industrial rural classes, though they are often seen through a filter of nostalgia for "simplicity," owned almost nothing, and lived narrow lives marked by ignorance, hunger, and destitution.)

Those who enacted sumptuary laws understood very well the relationship between material goods and individual power. So, more recently, did the administrators of a failing Soviet Union, who might have saved themselves for at least a little longer had they figured out (as the Chinese have) how to supply their citizens with such things as jeans and rock music.

That is the relationship that Jardine, McCracken, and McKendrick (among other scholars) are, in their respective ways, addressing: The translation of material wealth into an assertion of individualism. Their subject is people who are drawing (or have drawn) on their material context to recreate themselves and even, in McCracken's work, to experiment with their identities, either validating or escaping external, imposed, or inherited categories of class, nationality, or geography (the very sorts of categories in which the academic left—and such cultural nationalists as those of France and Canada—have been seeking to trap culture).

At a mundane level, one might argue that the more worldly goods (and services) to choose among, the less worldly constraint. But it is not the goods themselves that matter; what counts is the potential for making self-defining choices, an intellectual act. That is the engine driving culture under capitalism. The florescence of cultural artifacts that accompanies periods of intense acquisition is part of the same process of individuation.

Even some cultural-studies academics have begun to recognize consumerism as a route to empowerment. *The New York Times* recently reported that such scholars as Deidre Lynch, of State University of New York at Buffalo, are now arguing that 18th- and 19th-century stores allowed women to emerge into public, where, merely by imagining they owned the goods they saw, they were "transported into new identities." But because such intellectuals think commerce is about conflict and oppression, these scholars maintain that women browsers somehow taught store clerks lessons in class by taunting them with possible purchases, and even that they fortified class divisions by "cheapening" the clothes they tried on.

Anti-sumptuary Marxists regard even this analysis as going too far, because it grants consumers "creativity," "autonomy," "rebelliousness," and even "authority." According to British sociologist Don Slater, whose work is quoted in the *Times*, consumers have none of these characteristics. Such analysis reflects "the logic of the consumer society it seeks to analyze." The new theories, complains Slater, assume that consumers are rational and autonomous creatures who, in the *Times*'s paraphrase, acquire what they want and want what they acquire. Slater and his fellow critics think they know otherwise.

Sociologist Slater is, of course, speaking the language of Frankfurt School Marxism; the *Times* cites his belief that consumers do not know "real needs" from "false needs," a classic formulation. The century's Western Marxists, for all their own speciation of theorists, have never been able to come to grips with consumerism. They have advanced a series of theories that attempt to account for acquisitiveness and its cultural ramifications by denying individual preference, and as a result have blundered into forms of intellectual occultism: corporate mesmerism, class conspiracism, consumer robotism, etc.

All of this has grown out of the historical materialist theories advanced by Marx himself, which have shaped the intellectual understanding of the material world's effects on cultural activity. In 1846, Marx and Engels asserted that a society's cultural "superstructure" was dependent on its economic "base" (though many current thinkers "informed by Marx" regard that formulation as "vulgar"). The culture produced by those in material control of society was designed, according to the Marxist tradition, to maintain the ruling ideology. Culture was a tool of control and oppression.

THE RISE OF a materialist counter-vision that sees the opportunity for individual liberation in the nexus of culture and commerce is not so much a challenge to the left's long-dominant analysis as it is a reappropriation of the subject. The first such voices were raised centuries ago.

"All the arts seem to have been companions, if not the produce, of successful commerce," wrote the English music historian Charles Burney in 1776, "and they will, in general, be found to have pursued the same course...that is, like commerce, they will be found, upon enquiry, to have appeared first in Italy, then in the Hanseatic towns, next in the Netherlands."

Burney's judgment reflected a view widely held during the Enlightenment: Liberty encourages commerce, while commerce encourages culture. The writers of the Scottish Enlightenment were particularly drawn to the connection as they saw it played out in the Italian Renaissance. John Miller of Glasgow explored the connection between Florence's commerce and that city's leading cultural role. Adam Ferguson concurred, writing that "the progress of fine arts has generally made a part in the history of prosperous nations." Adam Smith himself intended to write a book on the matter, as historian Peter Burke notes in a brief discussion of the Scots. Smith never got around to it, but part three of *The Wealth of Nations* does include an aside on markets and art. (The foremost American voice on the matter was Tom Paine, whose concern was with commerce as a civilizing force.)

The most obvious objection to the direct relationship of liberty, commerce, and culture was noted by art historian Herbert Weisinger in a 1950 review of the Scots' work (in which he mistakes these Scots, of all people, for proto-Marxists). The problem is that the Renaissance makes for a poor case in point; many Renaissance city-states were actually petty despotisms. Philosopher David Hume and historian Edward Gibbon, among others, noted even at the time that art has also been a successful tool for tyranny.

But the English and Scottish cultural materialists celebrated the Renaissance not because they thought it to be a blossoming of freedom; as Weisinger notes, they were committed to the idea of progress, and the Renaissance was an advance over the Me-

dieval period from any point of view. As it turns out, the Scots' notions of commerce, liberty, and culture have been borne out within the very framework of historical development to which they were committed; they would likely have read the *Journal*'s manifesto of culture with no surprise.

The Scots were looking backward to make their cultural case; in fact, they actually had a much better example available to them to prove that culture expresses liberty, though they couldn't see that example because they were a part of it. At the very historical moment they were advancing their thesis, 18th-century commercialization was driving a sweeping transformation of the very idea of culture, and liberating not only the cultural audience, but the artist, too.

JOHN BREWER'S 1997 work, *The Pleasures of the Imagination: English Culture in the Eighteenth Century*, is a detailed account of how a new cultural world was built in the midst of increasing plenty. A former Harvard professor of history and literature who now teaches in Florence, Brewer is an old London Enlightenment hand who well understands the relationship between ideas and the material context in which they grow. His 1982 essay on "Commercialization and Politics" examines the changes in the period's political consciousness that emerged from the increasing commercialization of social activities, and demonstrates how those changes translated into growing demands for liberty (particularly as applied to the John Wilkes affair).

The story that historian John Brewer tells in The Pleasures of the Imagination *is of culture's entry into the urban marketplace. There, subject to greed, exploitation, tastelessness, and professionalization, as well as to the interaction of innovative creators and the demands of an ever-more interested and knowledgeable audience, cultural forms began to flourish in unprecedented ways.*

In *Pleasures*, Brewer is again concerned with commercialization, this time with its shaping of art culture. His book is a panorama of the period's fine arts, and the story he tells is of culture's entry into the urban marketplace. There, subject to greed, exploitation, tastelessness, and professionalization, as well as to the interaction of innovative creators and the demands of an ever-more interested and knowledgeable audience, cultural forms began to flourish in unprecedented ways.

His account of the growth of London's literary culture is worth pausing over. At the outset of the period, writing was largely a dilettante's pastime. So was reading, which was done mostly for edification, and rarely with the ludic, emotional involvement that was soon to emerge. Noblemen often wrote for their own amusement. (Horace Walpole, creator of the gothic novel, printed his own books in his basement.) However, theirs was a "liberal" calling, and it was beneath their station to accept money. "Writing for money," notes Brewer, "not only reduced authorship to a mechanical trade but subverted the value of the work." Literature for pay was venal.

As cultural activity intensified in Augustan London, however, there was a good deal of money to be made at writing, though not by writers. Most of the money went into the pockets of bookseller-publishers, who were anxious to meet the increasing demands of a literate public in the throes of revolutionary consumerism, and in the midst of a fiction-reading frenzy that owed much to the liberating opportunities of increasing wealth. These pioneering commercial publishers were not, in the main, men who loved books, as the current book trade likes to imagine them; they were out for a profit. Their ruthless treatment of writers was often appalling; they set writers to work in the literary sweatshops of Grub Street, paying them as little as possible while retaining publishing rights for as long as possible.

Brewer identifies two factors that established the professional author familiar today. The first was legal: Writers were able to establish property rights to the work they were creating. The second was intellectual, and has had far-reaching consequences. It was the assertion of creative genius.

The leading voice on behalf of writerly genius was author and lexicographer Samuel Johnson (for artists, the case was best made by William Blake). Johnson's best-remembered quote about writing is that "No man but a blockhead ever wrote except for money," a remark that is believed today to express literary cynicism. In fact, Johnson's powerful arguments on behalf of writers as wielders of creative genius were made in defense of writers as money-making professionals.

Eighteenth-century aristocratic taste dismissed the work of the new literary marketplace as pandering, manufactured trash. Johnson answered this position definitively by asserting originality, and praising those writers who "produce new ideas... [and] gratify the imagination with any uncommon train of images or contexture of events." Literature was not a disinterested effort to uncover "natural" truths by persons of "taste," as the aristocrats held; it was a matter of individual ingenuity. Such writers deserved to be paid, and to be respected as well. "[T]he association of creative genius with originality had never been made so forcefully," writes Brewer. Johnson and his allies won their debate.

It was the most important turning point in the history of modern letters. Creative genius was established as a cultural fact in defense of professionalization, just as literature was being thoroughly commercialized. The effect, of course, was to set writers free. Their social status (along with that of other artists), soared; the legitimacy of their creative vision was validated.

Armed with law and status, artists could present their work in a market and hope to attract a like-minded audience.

One result was the flowering of English literature. Similar changes in the perception of creative artistry throughout Europe set the stage for a succession of Western artist-centered movements—literary, visual, musical, etc.—that still continues.

Another consequence, however, was the conviction developed by writers and artists in the course of the 19th century that they themselves constituted a kind of aristocracy—a nobility of the spirit—and that they too were above a marketplace that, by its nature, manufactured trash and sullied their own imaginative creativity. The role of the visionary artist, though the very concept emerged from the marketplace, was to become not merely mystified, but sacralized. The achievements of the creative imagination, past as well as present, were set in a place so rarified that the material world was nowhere in sight. Soon, men could stand before a centuries-old picture of a recumbent nude woman in a salacious pose, and see in it harmonious amour, Dionysiac triumph, or the themes of Latin poetry expressed in symbols.

People are enthusiastic participants in marketplace culture because, rather than being victimized and oppressed by it, they find in it opportunities for the liberation and satisfaction of their senses and their intellect: It is a place of potential fulfillment. What some people do with their opportunities may be shallow; what others do may be creatively expressive.

IN 1837, A melancholy young poet gathered his verses, his sketches for yet-unwritten novels, and the notes for a creative life that would go unlived, and set fire to it all. His Romantic spirit was emerging from a crisis of the soul, and the fire he lit was meant as a cleansing. For days on end, he later wrote to his father, "I had been unable to think." The poetry he was destroying was filled with "broad and shapeless expressions of unnatural feeling." In his struggle with art, "Everything grew vague, and all that is vague lacks boundaries." Art for him was now at an end. He resolved to take up philosophy, where he could find "our mental nature to be just as determined, concrete, and firmly established as our physical."

Too bad he didn't like his verses more. The sorrowful young poet was Karl Marx, and the existence of a few more throbbing Romantic German poems—had he continued writing them—would have been a very small price to pay in exchange for the collectivist grotesque of the 20th century. That poet's search for "boundaries"—the antithesis of the variation that has proceeded from the market—is an effort worth pondering.

So is the fact that the very last believers in Marx's principles to have any influence are those concerned with culture. The last question that will be asked by the last Marxist will not be about modes of production or the proletariat; it will be about why people do any of the things they do. Why do they buy what they buy? Watch what they watch? Read what they read? Marxists have arrived at many answers to these questions, an indication that even they seem to know that all of them have been wrong.

Their answers, in their very profusion, make for a revealing chorus: Because the ruling bourgeoisie propagandized them, goes one answer. Because they have been forced to have "false needs," goes another. Because they've been hegemonized, goes a third. Because of the work of the consciousness industry, goes one more. The Marxist tradition has been so frustrated by history's refusals that it has developed an even greater contempt for its "masses" than it ever had for the demon bourgeoisie.

One answer of interest has recently come from the Marxist-influenced "Birmingham School" of cultural studies in England. It is almost the last possible Marxist answer: People watch what they watch, this school has concluded, because they take pleasure in the act. What pleasure? The pleasure, it unfortunately turns out, of "subversion." The viewing audience enjoys substituting its own subversive meanings for the intended meanings of corporate creators. Culture remains oppression in this school, but personal pleasure, and even a contorted version of personal choice, have at least gotten in the schoolhouse door. A little more homework, perhaps, and the scholars will arrive at the answer which the audience itself found long ago.

That answer is that people are enthusiastic participants in marketplace culture because, rather than being victimized and oppressed by it, they find in it opportunities for the liberation and satisfaction of their senses and their intellect: It is a place of potential fulfillment. What some people do with their opportunities may be shallow; what others do may be creatively expressive. Not everyone succeeds: Each person, in such a culture, is always balancing the risks that stem from his or her decisions against the personal satisfactions they hope for. In a culture shaped by liberty, people do the things they do for the very reason the 18th-century Scottish thinkers understood: because they are free to express their individuality.

We still have a handful of Karl Marx's poems. In one that he dedicated to his fiancee, he wrote turbulently that, "Ich stürme ohne Rast." I storm without cease. A truer line was never written by any better poet. But even his tempest has passed at last, and one more Prospero must drown his book.

Charles Paul Freund (cpf@reason.com) is a REASON *senior editor.*

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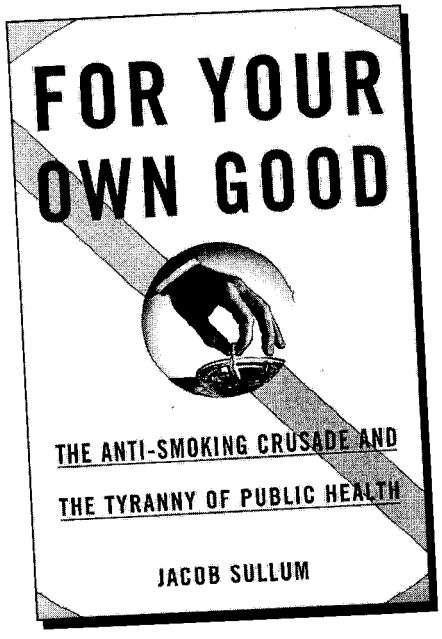

In ***For Your Own Good***, award-winning journalist Jacob Sullum examines the major themes of the anti-smoking movement, showing that tobacco's contemporary opponents echo complaints first expressed centuries ago. Today, under the banner of "public health," they say the government has a right and an obligation to eliminate tobacco consumption once and for all. Sullum argues that such a use of state power is illegitimate and dangerous, threatening the freedom of anyone who dares to trade longevity for pleasure.

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Wild, Wild Web

Most important new information technologies threaten—or at least seem to threaten—established interests, laws, and customs. In fact, the degree to which such technologies are likely to become useful and ubiquitous can often be measured by the amount of fear, anxiety, and disturbance they inspire. This is particularly true in the realm of intellectual property, especially copyright laws, which give authors and publishers the right to limit how certain information and material can be used.

Remember when cheap videocassette recorders first appeared en masse about a decade or two ago? Movie companies rushed to the courts to prevent the distribution of the machines and blank videotapes, claiming their copyrights would be infringed right and left—a concern that seemed to make a lot of sense at the time. Who, they fervently argued, would pay for a movie if they could get it for free?

In cyberspace, copyright infringement is only a click away. Commonsense guidelines to intellectual property in unsettled territory.

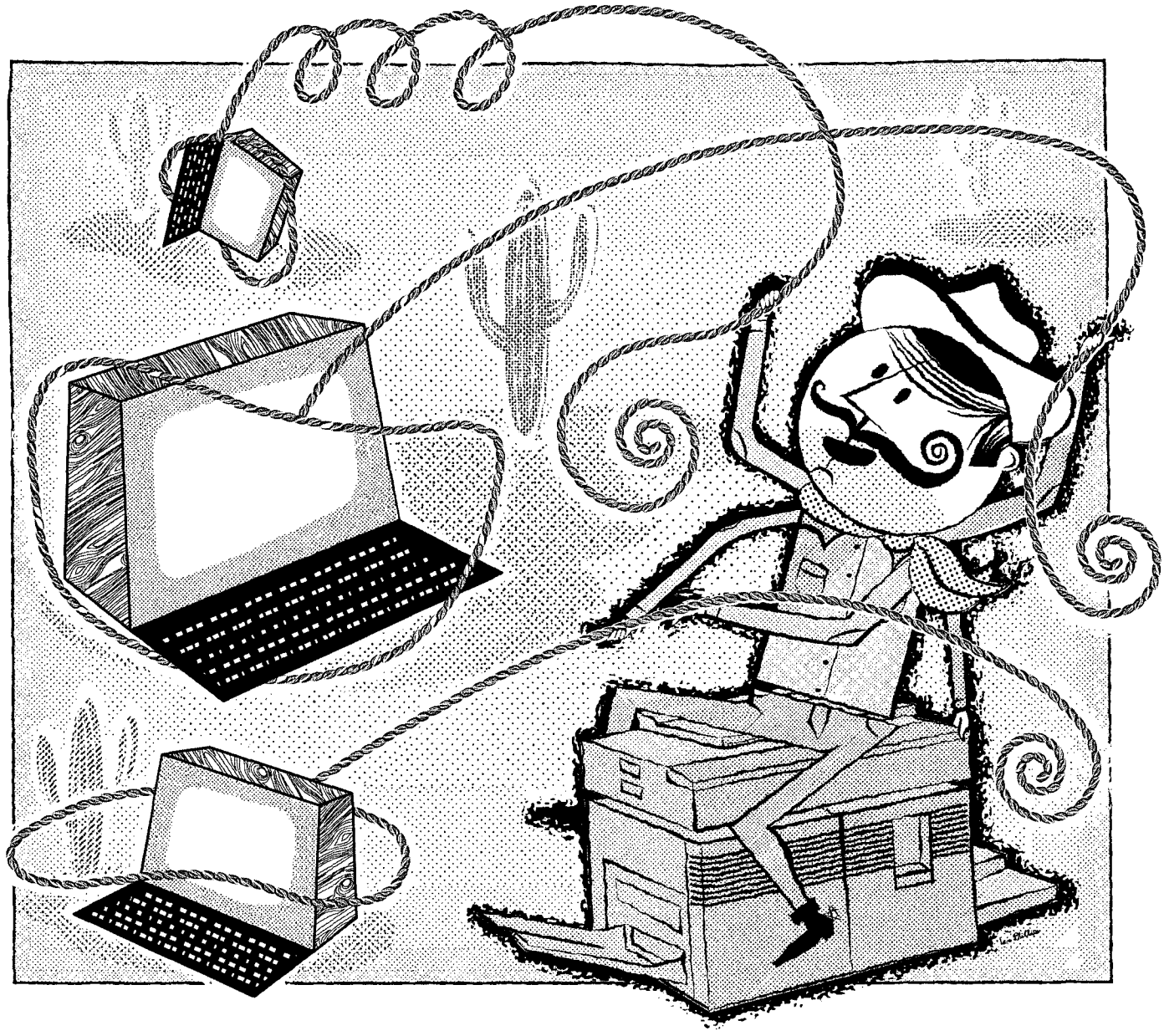
By Mike Godwin

The movie companies' nightmare never came to pass, but that hasn't stopped the movie execs from looking at the growth of the Internet with fear and trembling. That's because the Internet is perhaps best understood, technically speaking, as a global collection of copying machines that allows people to duplicate and broadcast all sorts of information with unprecedented ease. As the Internet becomes more and more important to our daily lives, it's easy to see why software makers, book publishers, and others who benefit from copyright protections are in a panic: People can now make an unlimited number of perfect copies of computer programs, books, and other materials and almost effortlessly distribute them around the planet. It's not surprising that an industry trade group like the Software Publishers Association launched copyright lawsuits against Internet service providers that hadn't actually facilitated or benefited from pirating copyrighted materials. The SPA hoped the cases, all ultimately settled at little cost to the defendants, would send a message to service providers everywhere and, more important, set Internet industry standards that would tilt the balance of legal duties in favor of copyright holders.

The tension between the almost frictionless information flow of the Internet and the desire of copyright holders to control the use and abuse of protected materials is exacerbated by our country's longstanding debate over the policy rationale for copyright law. The U.S. Constitution provides in Article I, Section 8 that "Congress shall have Power ...to Promote the progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." But when Congress initially exercised that power—the first Copyright Act was passed in 1790—it remained unsettled whether Congress's primary role in setting up an intellectual property framework was to protect authors or to serve the public. That question should have been finally resolved in 1834 when, in *Wheaton v. Peters*, the Supreme Court articulated the philosophy behind American copyright law that has persisted up to the present day. But copyright holders continually recast the law in terms of protection of their own property rights.

The Court in *Wheaton* decided that the purpose of the Copyright Act was *not* primarily to enrich authors and publishers but to "promote science and useful arts," as specified in Article I. This is the case that copyright scholars normally cite when they talk about the theoretical underpinnings of copyright in the United States, and implicit in its holdings is that the needs and concerns of the general public in an open society are paramount. Copyright law must be understood, therefore, as a means to an end (educating and enriching the public) and not as an end in itself (protecting the interests of copyright holders).

That said, it is no easy trick to apply such a principle to



IAN PHILLIPS

the real world—especially since everyone involved recognizes that one major way copyright laws benefit the general public is by giving copyright holders exclusive rights over their work for a specific period of time—currently the life of the author plus 50 years. (As this goes to press, Congress is debating adding 20 years to the term of copyright protection.) The assumption is that those rights provide strong incentives for people to create new and valuable works; weaken those protections and people have less incentive to write new stuff.

But the problems with traditional copyright multiply in cyberspace, and not simply because of the ease with which people can copy and distribute materials. In cyberspace the potential conflict between intellectual property rights and civil liberties becomes unavoidable because both economic and speech issues are rightly seen as questions about "information." So while it may be true that the Net, as Villanova University law professor Henry Perritt has commented, "can realize its potential only if it protects private property and makes it possible to offer something for sale or license," the Net's potential is more than simply economic—it's democratic, too. Its great potential to educate and enrich the public can be fulfilled only if the greatest number of voices are given an opportunity to speak and be heard. And, quite often, saying what needs to be said *requires* that speakers make unlicensed use of someone else's copyrighted work. This is why Congress provided for the limited right of anyone to make unlicensed "fair use" of others' copyrighted material (see section 107 of the Copyright Act). We're building new societies in cyberspace, and every new society must figure out what balances to strike between the economic rights of some individuals and the civil liberties of others.

As a copyright holder myself, I can sympathize with the people who are worried about the Internet's effect on intellectual property rights—as I said before, the Internet is, in a very real sense, a huge copying machine. Its very method of propagating content is copying "packets" of information from node to node across the globe. And this fact perpetually scares copyright holders, trademark holders, database companies, and companies with trade secrets. The information revolution can be a pretty frightening thing indeed when one has relied heavily on—and even invested in—one's ability to control the circulation of information.

It may well be that the potential economic threat to copyright holders requires some tinkering with our intellectual property framework. Certainly it would seem unfair if a competitor to West Publishing, a company whose whole revenue-generating enterprise centers on the recording and publication of court decisions, simply copied the fruits of West's labor and started up its own legal database services. But intellectual property holders have faced this kind of challenge before. What's more, it's often the case that the interests of copyright holders and others dovetail in mutually beneficial ways. Since VCRs have become a mainstay of American consumer electronics, the video market has generated huge financial rewards for the movie industry. Indeed, the video market now brings in more income for studios than theatrical releases.

It may well be that the potential economic threat to copyright holders requires some tinkering with our intellectual property framework. But intellectual property holders have faced this kind of challenge before. What's more, it's often the case that the interests of copyright holders and others dovetail in mutually beneficial ways.

VCRs teach another lesson when it comes to dealing with new technologies: The best guide to the way the law should work is to study the past and present, not to attempt to predict every possible future. As Justice Oliver Wendell Holmes said long ago, "The life of the law has not been logic; it has been experience." When a new media technology emerges, the best thing to do is to wait and see what problems actually emerge, not panic about what *could* happen. Once we understand the actual risks, we can legislate accordingly and with full regard to the competing interests at stake.

As that process gets under way—as the Internet becomes increasingly central to how we do business and how we live life—it's worth reexamining today's copyright statutory scheme, which is laid out in Title 17 of the United States Code. The last major revision of the Copyright Act took place in 1976, but the fundamental approach to copyright law in this country can be found in a passage from the legislative report on the Copyright Act of 1909: "In enacting a copyright law Congress must consider... two questions: First, how much will the legislation stimulate the producer and so benefit the public, and, second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly."

The reexamination of these two questions is an ongoing process, and the tensions behind these two sets of interests can lead to some fractious confrontations—ask the folks at C2NET, the Berkeley service provider that was sued for contributory copyright infringement claims in 1996 by the Software Publishers Association even though there was zero evidence that the company had even come close to infringement, contributory or otherwise. In the spirit of helping you speak freely on the Net while avoiding similar confrontations, my research assistant, Tess Koleczek, and I have distilled commonsense guidelines we call "A Good Citizen's Guide to Copyright on the Web (Or, How to Link Friendly and Influence People)," version 1.6. The philosophy behind these guidelines is not to tell you what you can get away with but to encourage you to treat copyright holders in the online world as friends and co-participants in this great social experiment we call the Internet rather than adversaries. The guide is designed to explain what we think it takes to make someone a good neighbor when dealing with other people's copyright interests in cyberspace.

You may already have a pretty good idea of the ways you can use the World Wide Web to benefit your business or enhance your personal enjoyment of the Internet. You may even already know something about how powerful and flexible the Web can be when it comes to capturing material off the Web and reshaping it for your own use. But when you're staring all that exciting potential in the face, you may find it easy to forget something very important: Just because new tools empower you to use the Web in creative new ways, it doesn't mean you should be using it in ways that hurt other people's rights and interests. And it especially doesn't mean you automatically have a legal right to do anything you want with the material you access.

Of course, we can't be your lawyers for you, so you shouldn't take what we're about to tell you as the legal advice that will help you out of your particular fix. But we can help you be aware of how to avoid some common pitfalls in copyright law by offering the following guidelines, which we've tried to translate into ordinary human-speak. We'd like it if you followed these rules, not only because they'll help you keep out of legal trouble, but also because it would help show the world that the Internet and Web-exploiting software can be used wisely and responsibly. We can't guarantee that these rules will keep all trouble from your doorstep, of course. But we're hoping that if we can start a general movement to treat copyrights with a little bit of extra niceness, the Web and the Net will be better places for us all. So peruse the following guidelines, and think about the ways you can be a "friendly linker."

1) Linking to other sites, even without express permission, is generally OK. But it is important to distinguish *linking* to a Web site from making a copy. Absent some explicit restriction on the part of the copyright holder, you can link to his or her page, and you have an implied license to make the copies that are made automatically when your browser or other software contacts the site. Making additional copies beyond that, however, is generally *verboten*, absent permission from the person

who holds the relevant copyrights. (See below for some exceptions.)

If you do happen to receive a request from the copyright holder of the page asking you to "unlink" from the site, it is generally good "netiquette" to respect that request, whatever the reason for it, and remove any link. But this needn't be a hard-and-fast rule. For example, your link to a political opponent's page may be used to illustrate a particular criticism: If you are pro-choice, you might want to link to an anti-abortion page (or vice versa) in order to make your point. Such criticisms, even with the attendant links, and absent any defamatory or libelous remarks, are generally OK.

2) Don't try to pass off someone else's material as your own. It doesn't matter whether you're linking or just plain copying—copyright law is all about making sure the person who holds the copyright for a particular work has the primary control over it and gets the primary benefit from it.

3) When in doubt, ask permission. If you would like to use someone's material, the most logical step is to ask—but be sure that the person from whom you are obtaining permission is authorized to give it.

4) Don't just *assume* that reusing material is OK. It is rarely a bad idea to ask permission to use material in order to avoid any potential problems down the road, especially if the material you are copying to your hard drive, floppy disk, Web page, off-line publication, etc., is something that the copyright holder might not want you to use. There is a great amount of leeway in copyright law that allows for use of material without permission, provided you stay within the rules. Sometimes it is not necessary to ask for permission in using copyrighted material, but you might want to ask anyway. And in copyright law, it often does matter if you can show you tried to find the copyright holder.

5) Use of ideas or information that you may have learned from a copyrighted work is also generally OK. Copyright law doesn't protect ideas or information—it just protects the *particular expression* of ideas or information once they've been "fixed" in a tangible medium (like paper or a hard disk). So if you see the movie *Love Story* and you write your own story about Preppy finds Girl, Preppy loses Girl, Preppy really loses Girl, you probably haven't violated anyone's copyright. But the minute you start posting actual dialogue from the book to your Web site, you can be sure you'll be hearing from Erich Segal's (or his publisher's) lawyers.

6) The mere possession of material does not make you the copyright owner. Say a guy sent you e-mail out of the blue, and it's something you feel like publishing. The copyright to the material you are using may belong to the author or someone else who has acquired it. Use of the material may still require permission.

7) Look at the purpose and character of your intended use. If you are using the material for educational purposes, limited use of the material may be acceptable, even without permission. However, if the use of copyrighted material is for a commercial purpose or is intended to derive some economic benefit, you will likely have to gain permission from the copyright holder and comply with certain conditions for use.

8) Compare the proportion of the work you are using to the work as a whole. It is one thing to quote a few paragraphs of a 20-page essay. It is quite another matter to take 800 words of a 1,000-word newspaper story. The amount and substantiality of the work you can use without permission is not carved in stone (or even set out in the law books), so be aware of how much of the "meat" of the work you are taking. This is a gray area, but if you're embarrassed by how much of the work you're "re-purposing" for your own use, it's probably something you should ask the copyright holder about.

9) In general, try to make sure that your unlicensed use of any copyrighted work does not significantly affect the potential economic market of the original work. OK, you can break this rule—maybe—if you've got a copy of the latest equivalent of the Pentagon Papers and you think the world has a right to know. But in general copyright holders have an exclusive right to use their material for economic gain. That's the assumption you have to begin with. So unless they give you permission to use their work, usually done in the form of a license, the impact you have on their market by your use of the work could expose you to an infringement lawsuit. And who needs that? (It's true that sometimes a court will rule in your favor anyway, as when factors such as educational or journalistic uses are important enough to outweigh the economic impact on the copyright holder.)

10) Don't assume that your use of copyrighted material on your company's internal network—e.g., a Web page on your Intranet—is not an infringement or will not be seen outside the company. Intranet Web pages may be limited in circulation, but they're not exempt from the copyright laws. And don't circulate infringing material within your Intranet on the assumption you won't get caught.

Don't treat other people's copyright interests as if they were necessarily opposed to your interests. Presume a collegial relationship instead. Often the owner of a copyright will discover his work being used without permission and simply request that it be removed from the publication, Web site, etc. And since you're a nice guy or gal, you'll want to comply. But you can't count on every copyright holder to be so understanding. Don't risk a lawsuit for copyright infringement by assuming you will not get caught.

If you have real legal problems, you need to talk to your own lawyer, and cribbing from our (copyrighted!) guidelines here won't suffice. But our experience is that if you basically do your best to be a nice gal or guy when it comes to someone else's copyrights, you're less likely to have serious legal problems in the first place. And since part of using the Net is finding new ways to connect with people and to work cooperatively with them, it's better if everybody acts nicely enough so that no one even thinks about going to the courthouse. Or at least not before it's absolutely necessary. ◆

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Mind Over Matter

Wherever you turn, every medium of communication is saturated with the terms *information revolution* and *intellectual property*. The root cause of the fascination is simple: Lots of money is involved. Both individuals and business organizations have become aware that their rewards depend increasingly on mental products—in the form of education, patents, copyrights, trade secrets, databases, computer-assisted employee cooperation, and general know-how—and less on machines, buildings, and raw muscle.

The size of the stakes would itself be enough to generate an explosion of interest, but another factor also counts: a high degree of uncertainty over who, exactly, will collect this loot. Will it be the individual inventors who generate the ideas? Teams of innovators? Entrepreneurs who translate concepts into commercially viable products? Venture capitalists? Long-term stockholders? Consumers? The obvious answer is that all these groups will share in the bounty, but this answer leaves a lot of latitude about the precise details of the split—and billions of dollars hinge on the answers.

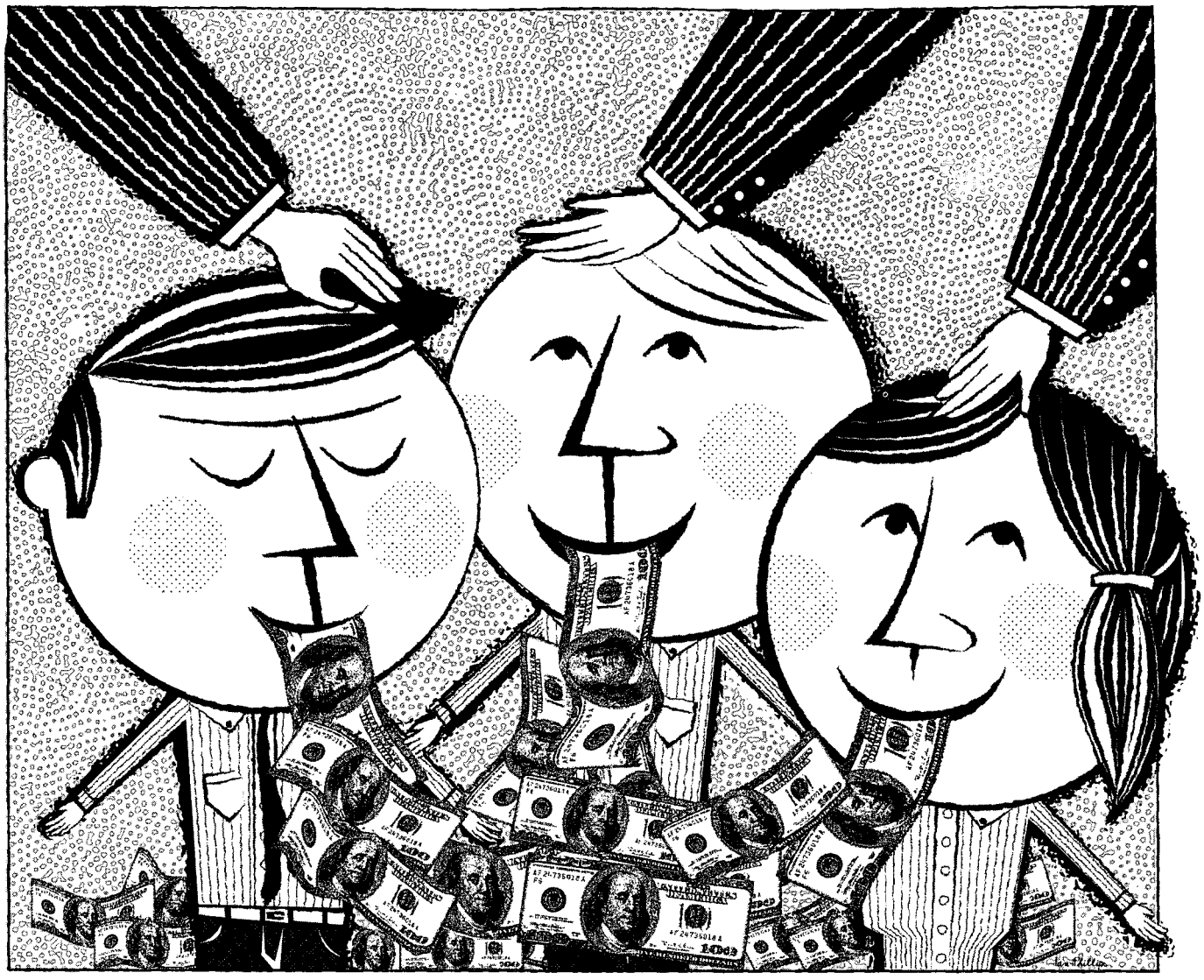
In the information economy, intellectual property is bringing huge returns. But just how will society split up the bounty?

By James V. DeLong

Wall Street seems to assume that a huge share will go to the stockholders. When Nervous Nellies fret that current stock price levels are extraordinary by all historic measures, and hence ripe for correction, the bulls point to the growing importance of intellectual property and information. The familiar yardsticks of companies' value, they say, are based on old industrial models in which the most important assets were plant and equipment, plus some allowance for the value of an ongoing business. But, continue the bulls, as value becomes more dependent on a firm's mental assets and less on its physical embodiments, those old measuring rods lose cogency. From this perspective, current market levels reflect the future earning power of mental assets that are not reflected in old-style balance sheets.

Take, for example, Microsoft, the flagship of the armada of new companies whose value is almost entirely mind-based. Microsoft has 2.4 billion shares of stock outstanding and, at press time, is valued by the market at about $220 billion. The company's physical existence is minimal: It has about $12 billion in cash, investments in other companies, plant, and equipment. That leaves $208 billion as the value of its patents, copyrights, trade secrets, brand name, presence on Rolodexes of customers, and the brains of its 25,000 employees. You can pare the physical component of value down even further. Microsoft's existing products are worth almost nothing in the sense that if the company announced it was freezing its designs and planning no further improvements, its products would be obsolete in a couple of years—and the company's value would drop precipitously. Clearly, no analysis based on physical assets captures the essence of this company or others like it.

So you can make a serious case that almost all of Microsoft's value lies in the new-style form of information and intellectual property, and mostly in the brains of its staff. But while Wall Street bulls may be right about that, it's far from clear that stockholders will snag those brain-based earnings in the long run. Consider that, in 1997, Microsoft produced earnings of $3.5 billion. Of this, zero dividends were paid to the stockholders—the same payout they have gotten every year since the company produced its first earnings of a penny per share back in 1982. Employees, on the other hand, not only got their salaries, they also got 96 million shares of Microsoft stock, which they were entitled to buy at bargain prices under various option plans. The company spent $2.4 billion buying shares to meet this commitment, and if this sum were added to the company's wage bill,



IAN PHILLIPS

Microsoft's 1997 earnings would drop by two-thirds.

Roger Lowenstein, a columnist for *The Wall Street Journal*, cited these figures as an example of a general phenomenon that companies are "transferring ever-appreciating portions of their profits to workers...motivated not by warm-hearted charity but by cold-hearted reality. Capital is in surplus; skilled geeks are at a premium. No surprise that labor is grabbing a bigger share of the capitalists' pie." Indeed, Microsoft looks a lot like a cooperative venture of its employees. At the end of 1997, the officers and directors, the people defined as "insiders" by the Securities and Exchange Commission, owned 35 percent of the company's stock. Many lower-level employees also own shares. While the company will not say how much stock is held by employees other than the "insiders," it is commonly reported that at least 6,000 of them own enough to be millionaires. In addition, it is known, again through SEC-required disclosures, that employees hold options to buy another 22 percent of the stock, at an average exercise price of $21. In sum, then, we know that the employees have a claim on at least 57 percent of Microsoft's value, plus an additional unknown percentage for the shares already owned by the lower level-employees.

The tug between stockholders and geeks within the information companies is only one dimension of the coming struggle over brain-created value. Another is even more basic: How much will the information companies themselves keep, as opposed to other players in the economic system, and consumers? To repeat the obvious, we are talking about massive gains here—very much a positive-sum game—and all the players should wind up better off. But some will be more better off than others, and the various amounts that will be paid out are up for grabs.

As a half-hour spent browsing through the new buzzword–larded books in the business section of any local bookstore will demonstrate, discussion of information issues is often muddied by a tacit assumption that "information" is a free-standing entity that can be understood separately from any physical embodiment. This is not so. The value of most information is inextricably linked to its context. For information to be significant it must be *about* something, and to assess its value you must bring that *about* into focus.

For most information, the crucial question is how it increases the efficiency with which we use physical assets, such

as capital equipment, labor, and energy. This is not a novel phenomenon. Go back 1,000 years or so to one of the great information revolutions of human history—the invention of the horse collar. The Greeks and Romans harnessed a horse by putting one strap around its belly, another around its neck, and joining them on top of the shoulders. The connection to the wagon or chariot ran to this junction. Under a load, the neck strap pulled tight and choked the horse, which cut its ability to pull by about 80 percent. All heavy loads were pulled instead at a slow pace by plodding oxen.

The horse collar, which came to Europe sometime during the Middle Ages, changed that: It still went around the neck, but two connections to the load were used, placed lower down and to the sides to take the strain on the shoulders rather than the windpipe. This adjustment multiplied a horse's pulling power by a factor of five, and, since horses are faster than oxen, also increased the speed with which goods could be hauled. The idea of the horse collar, when incorporated into a cartage system, was an extraordinarily valuable piece of intellectual property.

Much of the current information revolution is similar: Its value lies in its ability to increase the power of other factors of production. Consider the carrying capacity of telephone wire fiber. In 1989 a strand of such fiber carried 24,000 simultaneous calls. In 1997 it carried 516,000. The number will jump to 1.8 million calls this year, and to 8 million in 1999. The increased capacity is a result of changes in software—that is, in information processing—not in the nature of the fiber itself.

Another example comes from the oil industry. Improvements in processing the complicated data generated by exploration techniques has cut by a factor of three the number of wells that must be drilled to figure out the size and shape of a newly found oil field. Or take agriculture, where reliance on global positioning satellites allows farmers to micromanage the application of fertilizer down to the square yard. In all these contexts, and myriad others, information makes physical assets or energy or human labor more productive.

Sure, we need to encourage innovation, but we do not want to allow massive enclosures of the intellectual commons. Nor do we want to tie the whole economic system in knots by imposing transaction costs on all the cross-fertilizations that occur in the interaction of creative minds.

The horse collar was a great invention, but it is safe to say that its inventor made no royalties on it. Medieval Europe lacked a patent system, and a horse collar, once seen, was easily duplicated. Besides, it would have occurred to no one at that time and place that ideas or inventions could or should be protected. The very idea of a patent system that converts ideas into tangible, profitable, marketable property was itself a milestone invention in human history, a major contributor to the great economic ascent that began in the 18th century. It became economically rewarding for people to think systematically about innovation, and they responded with an outpouring of creativity.

The problem that has bedeviled societies ever since is how much to reward intellectual property, given that it is inextricably intertwined with other things. Suppose the inventor of the horse collar could have gotten a patent. A cartage system that was collecting $1.00 in freight charges for a particular trip can now haul five times as much and can collect $5.00. Should the patent on the horse collar entitle the inventor to the entire increase? If so, *which* inventor, given that few innovations appear in perfected form and an end result comes from tinkering by many minds over a period of time?

The owners of horses and wagons, not to mention the drivers, will also stake a claim, pointing out that the collar may be a fine thing, but without them it produces nothing. So why should its inventor get so much? Consumers will suggest that perhaps the freight charges should remain at $1.00 while the price of goods is dropped. After all, inventors draw heavily on the general stock of knowledge that exists in a society, so why should either they or the owners of the physical assets collect all the rewards? Sure, we need to encourage innovation, but we do not want to allow massive enclosures of the intellectual commons. Nor do we want to tie the whole economic system in knots by imposing transaction costs on all the cross-fertilizations that occur in the interaction of creative minds.

As societies become more complex, ever-more-nuanced tensions arise. The newspapers and the legal reporters are filling up with stories showing the difficulty of drawing the proper lines. Some involve lines between employers and employees. Evan Brown, who works for DSC Communications, a company that makes equipment for the telecommunications industry, and who signed a complex contract governing inventions, has an idea for updating old computer software. He says it was 80 percent complete before he went to work for DSC, and that it is unrelated to DSC's business anyway, so it is his. DSC thinks the idea belongs to the company: "If a janitor came up with a method of cleaning a hardwood floor suggested...by work in cleaning a DSC hardwood floor, technically the idea belongs to DSC," it argues. A novel element in the situation is that Brown has never put his idea on paper and has refused two court orders to do so.

Other stories look at the lines between scientists, as when a biotechnology company claims that a key idea was stolen from a scientific paper during peer review and used to obtain a patent for a rival. Among its defenses, the rival argues that the peer review process carries no obligation of confidentiality. Yet other stories turn on the lines between generators of intellectual property and consumers. A couple of years ago, the American Society

of Composers, Authors, and Publishers, which collects for the use of music that has been copyrighted by its members, got into an embarrassing brawl with the Girl Scouts over the use of songs at summer camps. ASCAP claimed that the Scouts should be paying license fees, and earned headlines such as "The Birds May Sing, But Campers Can't Unless They Pay Up," "Campfire Churls," and "Legal Sour Notes." In the face of such negative publicity, ASCAP retreated.

No perfect answers to the problems of dividing the fruits of invention exist in the theory or practice of either ethics or economics, but society has evolved a series of rough-and-ready rules designed to reward and encourage invention without slighting the interests of other players on the economic system. Patents and copyrights are limited in time. You can patent only an actual device, not a general idea; if someone else invents another device that performs the same function, that's too bad for you. An inventor of a horse collar could patent his particular design, but could not patent "the idea of a collar that shifts the strain to a horse's shoulders." As the U.S. law puts it, one cannot patent an "idea, procedure, process, system, method of operation, concept, principle, or discovery." Einstein, to the regret of his heirs, could not patent the formula $E = mc^2$. Nor could Apple Computer, to the regret of its stockholders and employees (and to the delight of Microsoft), patent the idea of a mouse and a graphical user interface, both of which originated elsewhere anyway. On the other hand—and showing the considerable confusion over the exact meaning of these formulas—a patent was issued covering a way to swing a golf club.

It may seem a long way from horse collars and cartage systems to today's high-tech industries, but the distance traveled is really not so far. One of the great challenges over the next few decades will be to evolve property rights in intellectual products in a way that reconciles old concerns in these new contexts.

Other restrictions exist, such as the proviso that no one can patent familiar or obvious devices or logical extensions of current art. Because such a proviso can conceivably undercut virtually any patent, this is precisely what most patent litigation is about. We also retain our fundamental faith in the virtues of competition and impose some legal limits on the use of patents as mechanisms of monopoly. The current government investigation of Microsoft focuses on the charge that it is trying to leverage its power over the intellectual property of the Windows operating system into control of other areas.

It may seem a long way from horse collars and cartage systems to computer software and today's high-tech industries, but the distance traveled is really not so far. One of the great challenges over the next few decades will be to evolve property rights in intellectual products in a way that reconciles old concerns in these new contexts.

The task will not be simple, because the stakes are large and the conflicts are going to be fierce. Furthermore, the sides are not obvious. The interests of investors, managers, employees, consumers, and inventors are all multi-dimensional, and sometimes counterintuitive. For example, it is often assumed that large corporations favor expansive rights in intellectual property so that they can buy them up. But this is not necessarily so. Those whose power is financial might be better off with narrow definitions. That way, they can copy innovation freely and rely on marketing muscle to squeeze out the inventors. Small inventors worry about this possibility in connection with pending legislation that would make patents public 18 months after the application is filed rather than when the patent is granted, as is the present practice. Big companies, they fear, will steal the ideas and wear down inventors through litigation.

Similarly, how far should creative people go in demanding legal protection for the fruit of their labor? Creators are borrowers as well as lenders, and a requirement that they get permission for every cross-reference would be a heavy—even potentially crushing—burden. A healthy intellectual commons is to the benefit of all, but precise definitions of all the terms in that claim are elusive. Hence, in the ongoing debate over possible reform of the copyright laws, the boundaries of the concept called "fair use" is one of the most contested topics.

Corporate management will also be affected. In theory, managers are the agents of the shareholders exclusively, bound to promote their interests. But, as in the Microsoft context, "capital is in surplus; skilled geeks are at a premium." So the managers who do the best job for their shareholders in the long term will be those who are good at harnessing the mental energies of their information workers. This requires a more subtle balancing than exists at present between the interests of investors and employees, especially when, as with Microsoft, these categories have huge overlap. Since 1994, for example, Cisco Systems, a leading manufacturer of Internet hardware, has purchased 19 companies, most of them small software firms on the brink of product launch. "In short," says *The Wall Street Journal*, "Cisco is buying new product teams on the open market...and it is paying lofty prices —sometimes as much as $2 million an employee." When you pay that much for mental machinery, you have to figure out how to keep it in good working order, and, unlike *metal* machinery, you cannot do this with an occasional squirt of lubricant.

All in all, it should be an interesting time. ◆

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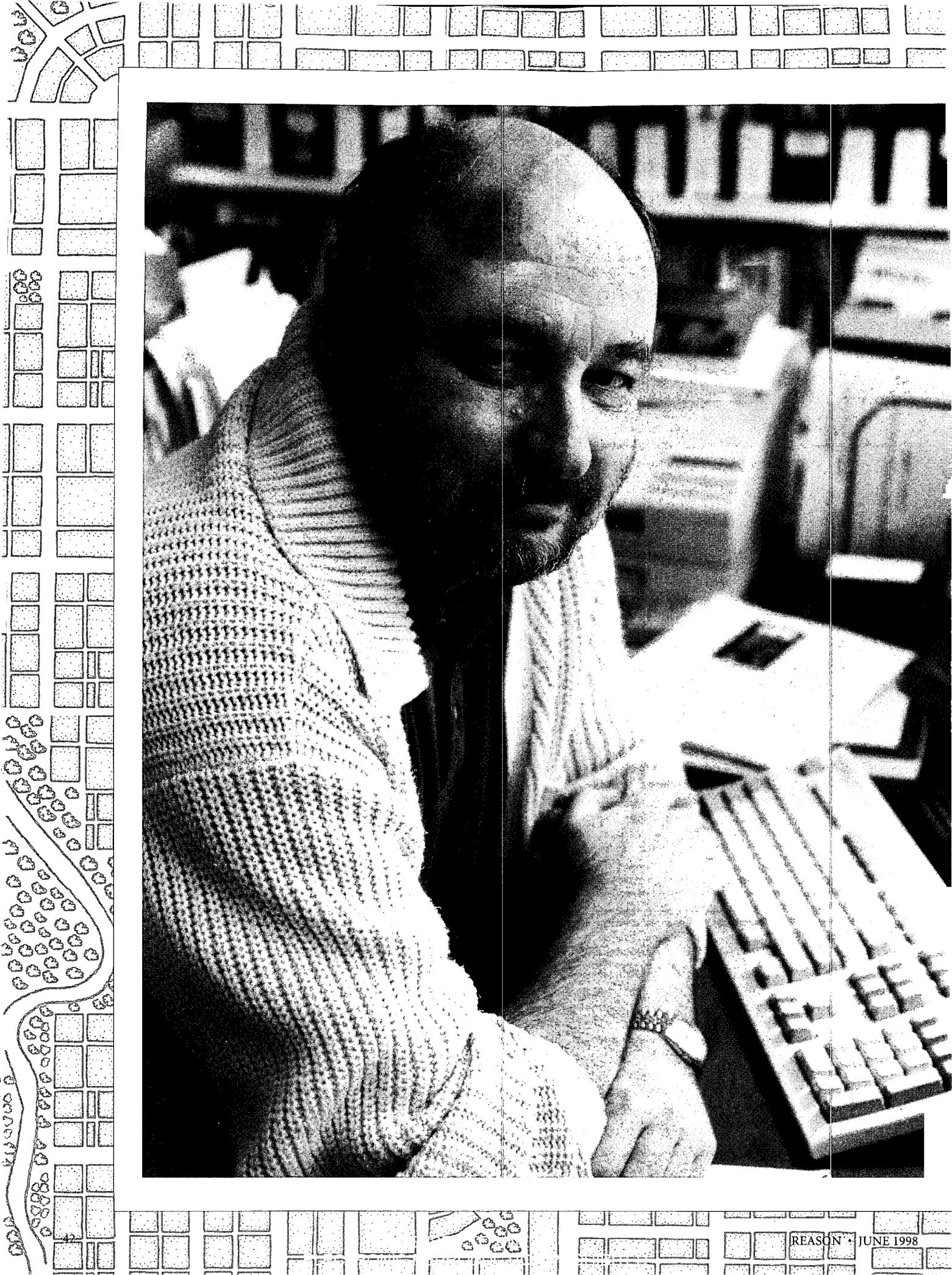


Plan Obsolescence

Urban planning skeptic Peter Gordon on the benefits of sprawl, the war against cars, and the future of American cities.

Interviewed by Rick Henderson and Adrian T. Moore

Life in America's suburbs is under attack. In journals ranging from *The Nation, The Atlantic Monthly*, and *Utne Reader* to *The American Enterprise* and *The Weekly Standard,* critics of suburbia argue that policies implemented since World War II—from the home-mortgage income tax deduction to subsidies for automobile operation to inflexible zoning laws—have lured Americans away from traditional downtowns and urban neighborhoods into soulless suburbs, where a landscape littered with strip malls and tract housing makes it nearly impossible for people to form genuine communal bonds with their neighbors. Contemporary suburbanites are condemned, in the words of the left-leaning *L.A. Weekly,* to "a future of endless sprawl and equally endless commutes."

To save suburban dwellers from this hellish existence, urban planners have devised massive subway construction projects, controls on the development of neighborhoods with single-family homes, "mixed-use" zoning districts that allow commercial operations to coexist with residences, and "urban growth boundaries" that have made it illegal to build homes or locate businesses on the outskirts of such cities as Portland, Oregon.

Enter Peter Gordon, a professor of planning and economics at the University of Southern California's School of Urban Planning and Development. For nearly three decades, Gordon, along with his USC colleague Harry Richardson, has challenged conventional views about gridlock and sprawl, finding that the data don't match the received wisdom: "Suburbanization" is not an artifact of late 20th-century America but a process that has unfolded as long as people have possessed the means to travel and relocate. Commute times are no longer than they were 15 years ago. Individuals are finding the types of living arrangements they prefer. And while Los Angeles–style sprawl is vilified in the traditional planning literature, as well as in most popular accounts of urban life, Los Angeles has the highest population density of any major metropolitan area in the country.

Gordon, who received his Ph.D. from the University of Pennsylvania, has published dozens of articles in popular publications and peer-reviewed journals. He is co-editor of *Planning and Markets*, a new online publication that focuses on land-use and transportation issues (www~pam.usc.edu). While he may be considered a lightning rod in the planning community, in person he's gentle and patient, hardly the sort of firebrand his heretical views suggest.

REASON Managing Editor Rick Henderson and Adrian T. Moore, director of economic studies at the Reason Public Policy Institute, interviewed Gordon at his Brentwood home in March.

Reason: There is a pervasive argument among traditional planners that compact cities built around a traditional downtown are intrinsically good. While cities once developed around transit centers, raw materials sites, or natural harbors, contemporary cities seem to be more the artificial creations of planners. What has happened?

Gordon: Compact cities are archaic forms, and they are not coming back. When you study the economics of location, all the textbook models say a firm wants to locate near the urban core or other advantageous sites, and workers must make their living arrangements so that they are close to their jobs. That may be the way it was once upon a time.

But all these firms have become much more footloose. And they go where the workers want to live. The orientation has flip-flopped. Even manufacturing businesses are no longer locked into specific sites, so they have more locational choices. They want to go where the labor force wants to go. The workers

PHOTOS: JONATHAN NOUROK

and their families want to live where the land is cheap and the air is clean and the schools are good and there are high amenities and so forth. There's a lot more spatial flexibility than ever before, and the consequences are pretty benign.

People don't have to live near work. They can be near good schools if they want to be without paying the price in longer-duration commutes. If you make travel less expensive, there will be more travel.

Reason: You've shown that the average-duration commute has stayed the same over the past 15 years or so. Why does everyone believe that traffic congestion is getting worse?

Gordon: What's interesting is how little congestion there is. If you take a resident of any large foreign city like Tokyo and transplant him or her to Los Angeles, they think they've died and gone to heaven, because the commutes are less than half, on average, here than they are there. Something like 10 percent of the people nationwide commute more than 40 minutes one way. There is a lot of self-correction going on. For 1995, the average automobile commute in L.A. was 23.5 minutes one way.

People are part of a spontaneous order. I think it's not only pessimistic but even ignorant to believe that people are going to sit tight while their lives go to hell. That's never happened. Even where the commuting distances have increased, the trip durations have not, which means commuting speeds are up. It is the opposite of impending gridlock, and it means people can have their cake and eat it, too.

Reason: So why don't people in Tokyo correct in the same way Angelenos do?

Gordon: Many Japanese choose long train commutes because they have a much smaller scope of trade-offs available. Automobile travel is much more expensive [in Japan]. Land doesn't change hands as frequently. There are all kinds of things standing in the way of the fluidity that we're used to.

Reason: You're a critic of the New Urbanism, which is the hot thing in the planning profession. Here's how Alan Ehrenhalt describes the principles of New Urbanism in *Governing* magazine: "The automobile, and four decades of building homes, streets and suburbs for the automobile's convenience, were draining American places of the community and intimacy that human beings naturally desire." The New Urbanists claim that people want neighborhoods with tree-lined streets, and parks and shops all within walking distance of homes. What's wrong with that?

Gordon: I think the development of neighborhoods by private developers is driven by markets, not by public policy. People are getting the neighborhoods they want. And I trust that competing developers are reading the trade-offs that you and I are willing to make and that those trade-offs include our demand for community. Our demands for community are met in many ways. We can use the automobile [to meet those demands], or we can even use the Internet.

People are getting a sense of community in the neighborhoods we have. We know that 20 percent of all trips by automobile are for work, 20 percent are for shopping, and 60 percent are for things I would call social. The U.S. Department of Transportation uses categories like family/personal business, school, church, visits to relatives, and other social or recreational uses, but you could easily call all these social or "community" trips.

New Urbanism is heavy on intervention, and it's tied into the "civil society," or communitarian, discussion. It dances around defining whether there's a problem with the way we live and says, "There's a problem—automobile use—and we have a solution." I'm not sure we all agree there's a problem. And it's a long shot to say that there's a design fix and we know what that design fix is.

Reason: Conservatives such as Karl Zinsmeister at the American Enterprise Institute have become big boosters of New Urbanism. They argue that the fatal conceit of traditional planning and zoning has led to these soulless suburbs. But aren't the conservatives substituting their own fatal conceit, that everyone wants to live in Small Town, USA?

Gordon: That's the weak link in the New Urbanism. If there were a grain of truth in their view, we would soon see people demanding it, and developers would strive to provide it. Builders are not ideologues.

New Urbanists say there are land use configurations that will lead to lower trip frequency. And if we object to the use of the automobile, then we can develop a land use solution. They have advanced all kinds of street designs, and hypothesized how to lay out homes and neighborhoods more compactly, and say if people can walk to all the places they need to go, presto, there will be less automobile use. The smallest introspection will show that trip frequency isn't fixed.

The New Urbanists certainly haven't done their homework. They certainly don't look at the facts a lot, so I keep going back to the international comparison. We've all traveled, we've all seen suburbanization in other parts in the world. There's clearly a universal demand for and use of automobiles that's reflected in the data.

International studies, like those from the Organization of Economic Cooperation and Development, are always funny to read, because the authors prejudge everything. At the beginning you have all these conclusions articulated that the automobile is the problem, what are we going to do with the automobile, how can we keep people out of automobiles, and so on. But what's revealing is that the authors lament automobile use in all these places. You have a tough time blaming American policy for automobile use [in other countries], and when you get rid of that explanation, you have to end up saying the reason people drive is consumer preference. Preference is a pretty powerful explanation compared to the one suggested by the New Urbanism.

Not just that, but the New Urbanists claim suburban development, which they call "sprawl," is something that people are using against their better judgment. One of the favorite themes of planners is that people haven't got enough choices, and builders are restricted by zoning codes to give people stuff that they don't really want. That's of course inconsistent with

the other story the New Urbanists tell: that planners are beholden to builders. Well, if that's true, and just one of these greedy builders would figure out that people wanted to live in neotraditional settlements, then that greedy builder would overcome political barriers and we'd have the neotraditional developments.

Reason: Aren't there private attempts to create the type of places the New Urbanists want?

Gordon: I don't know of a lot of success stories. A lot of these developments are too new to judge. A lot of attention has been paid to the Disney-built community in Florida [Celebration], but the reviews of it have been mixed. Even that refers more to opinions of reviewers and less to the judgment of the market.

Reason: *The New York Times Magazine* has suggested it's more like living in a Disney-built theme park than in a real community.

Gordon: But social arrangements that are provided in the marketplace are constantly evolving. We would expect that savvy builders are evolving and experimenting in providing new things. It's a wonderful process.

If the New Urbanists have something to contribute to that evolution, that's wonderful. But instead they want to make a clean break and say that society is marching one way and we know the way it ought to go instead.

Reason: What's good about suburban living?

Gordon: Those of us who believe in markets place a lot of value on living arrangements that are an expression of consumer preferences. People are voting for spacious living, so by all means let them have what they are voting for. They're voting for access to their schools, they are voting for clean air and those kinds of things. By any measure, suburban living has to be a success story.

Americans run to [visit] Europe because, hell, those are *cities.* Now, that doesn't mean we choose to live there; it's just a nice place to visit. Traditional cities are fun for tourists. [That has] nothing to do with whether you want to live there.

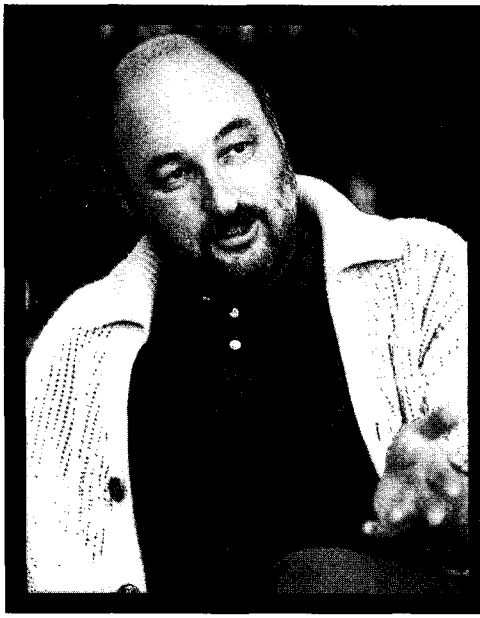
There is the presumption that suburbanites are living these lives of quiet desperation and isolation, and they really hate being there. You see trotted out ideas about community being missing. And to have community, you've got to be in Manhattan. There are a lot of ex-Manhattanites that would challenge that theory very seriously.

Reason: A lot of people seem to think that auto travel is heavily subsidized but mass transit isn't.

Gordon: Federal transit subsidies go back to the 1960s, and for the first 10 years they were capital subsidies only. You had all this overbuilding of rail transit and a lot of people wrote articles that said overbuilding occurred because the feds subsidize only one part of the activity, and that's building. In 1974 the feds began subsidizing operation as well as building of transit systems. The whole idea of a federal transit policy may be silly, but as long as all this money is funneled though Washington, locals want to get in line to get theirs.

Whether you [do] it per mile or per trip, transit subsidies are hugely greater than any subsidies to the automobile. Per passenger mile, transit subsidies are 50 times what auto subsidies are. And the L.A. experience suggests that we spend a lot of money and get less transit use. We're spending more to get rid of riders. Back-of-the-envelope calculations show that about $7 billion has been spent on rail so far, and we know that they've lost an aggregate of about 1 billion riders over a 10-year span. So they've spent $7.00 for every transit rider eliminated.

Reason: How does that loss of ridership compare to the national average?



"Those of us who believe in markets place a lot of value on living arrangements that are an expression of consumer preferences. People are voting for spacious living, so by all means let them have what they are voting for. They're voting for access to their schools, they are voting for clean air and those kinds of things. By any measure, suburban living has to be a success story."

Gordon: There have been market-share losses in all of the new rail cities. The other thing you want to control for is background growth. So this is over a period where L.A. County added 12 percent to the population, and a lot of those were lower-skilled immigrants, who are sort of a natural constituency for mass transit. So to spend that much money and lose that many riders, that's not simple. You've really got to work at it.

Reason: Is any public transportation economically viable?

Gordon: At best, a *maybe* if you legalized vans. There's a big fight in New York City over them right now. Los Angeles legalized airport vans, and now Super Shuttle wants to get in the way of new entrants. But whatever [form of public transit] you come up with would be running neck and neck with large numbers of used cars. The transportation mode of choice of low-income people is used cars.

Reason: The communities that are held out as almost utopian by the New Urbanists—Portland, Oregon, or the Kentlands in suburban D.C.—have intensely politicized almost every private land use decision. Is putting every decision about painting your roof before a plebiscite the way people really want to live?

Gordon: That scares off a lot of people because they fear that their own property rights are up for grabs. If their own property rights are subject to being put in a common pool, a lot of people will say, "No, thank you."

On the other side, we have the growth of community associations, or what some people are calling entrepreneurial communities. When everything is contractual, then you're not going to have these surprises. So people are making ever more such choices, and it puts them in the category of getting out of harm's way and providing insurance for my property rights, because my property rights are ever more up for grabs, [depending upon what] judges are doing or not doing, or what the zoning board is doing in response to organized groups, and all that. The entrepreneurial communities—or whatever you what to call them, community associations—are a mechanism that fits very well.

Reason: But can't community associations become political organizations that have as much power as zoning boards?

Gordon: If everything is covered by contract, there are no misunderstandings and no surprises. We either bargain for the contract that we want or we go look for another one somewhere else.

Reason: But contracts can't anticipate everything. An entrepreneurial community established 20 years ago could have never anticipated the development of 18-inch satellite dishes, which might well be banned in such a place.

Gordon: More adaptive forms will have to come on the market. My friend Spencer MacCallum, an anthropologist who writes on these issues, says that we may see the development of leasehold arrangements rather than traditional contract arrangements. The model he uses is that of hotels and shopping malls, where entrepreneurs provide services that people want. Leaseholds may provide much more flexible property arrangements than we typically imagine.

Reason: You mean the neighborhood association may renegotiate parts of its contract every year? We won't let you build a deck on the back of your house this year, but next year we'll think about it? Or people could decide to live in rigidly defined communities with extremely inflexible contracts if there's a demand for them?

Gordon: Right. All in the direction of increasing competition. People are more mobile than ever, and they have an easier time moving from one place to another as their requirements change.

The downside of these entrepreneurial communities, of course, is that as more affluent people withdraw from cities the interest groups that are left behind become ever more powerful. The people who are victims are the people who are least likely to move. We condemn the poorest to the worst public schools and the worst public services.

Reason: So are decaying urban cores part of an evolutionary process that no planning can overcome?

Gordon: The best thing that's happening to old urban cores is the immigrants, and immigrants have almost nothing to do with the planners except for the fact that planners often give them a hard time when they want to get occupational licenses. The infusion of capital and entrepreneurial skills in the core areas is coming entirely from the immigrants. If we make it our business to chase them out, then we may be hastening the decay of those urban cores.

Reason: You don't fit the profile of the typical urban planner, advocating top-down remedies. How did you arrive where you are? Are you indeed atypical?

Gordon: Planning is so eclectic it draws people from everywhere: architecture, the social sciences, the natural sciences. You really get an odd stew. I have a very Hayekian view of the world, and given the way that I view the evolution of the built environment, the Hayekian view has a lot to say. I teach about markets, so I'm less suspicious of market mechanisms than most of my planning colleagues.

And even when I speak with like-minded colleagues, I have to ask if market-friendly planning is realistic or plausible. Is there any mileage in doing market-friendly planning, or are spontaneous orders or spontaneous adjustments going to outdistance what planners try to do all the time? And that's why it's interesting to look at the migrations that are going on into the exurbs and into private communities, because those are going on in spite of any planning or any policy.

If we have local policy interests, and we have an understanding of the role of markets, then I think you reach the conclusion that a lot of the conventional, command-and-control stuff is disastrous. Spending $7.00 per rider to lose a billion transit riders is disastrous. So I think we have a huge case study which does not offer us any cause for optimism for traditional planning.

What can we, as researchers, really do? We can quit, or we can keep believing—let's unearth some of these facts and ideas, present them as best we can, and maybe somebody will learn

something.

Reason: How are you perceived in the planning community? Are you on the fringe?

Gordon: I'm at the edge of the fringe.

Reason: So when you go to the American Planning Association's convention, do you drink alone?

Gordon: Well, I don't go very often. When I'm invited to speak at certain places, I think it's as a curiosity. There's the usual handful of people who thank you. God knows if they thank you because they've been informed or entertained or whatever.

But the intent is to uncover some facts, support them as best you can, put them in context, because there are all sorts of unfounded assertions out there.

Reason: Even so, the traditional planning community doesn't seem to shun you completely. In the Winter 1997 issue of the *American Planning Association Journal*, you and your USC colleague Harry Richardson engaged in a fascinating debate with Florida International University planning professor Reid Ewing. Your article, "Are Compact Cities a Desirable Goal?," was a straightforward exposition of the case against traditional planning and for consumer preferences. Ewing's "Is Los Angeles-Style Sprawl Desirable?" directly challenged your arguments. How did that come about?

Gordon: We sent them our article, and they wrote back and said, "We can run this if we run it with a counterpoint." There wasn't even the suggestion that they would run ours alone. I'm happy they did run both, because I want that discussion to be out there. Nevertheless, the editors of the journal of the APA felt they needed the safety of a counterpoint before even letting us present our side. But Harry and I were pleased to find out that the editors awarded us honorable mention for feature article of the year.

I was asked to address the L.A. City Planning Commission two years ago because there was a draft of their plan which favored transit-oriented development. And I said, "Here are the various reasons why it will not work." The response I got was a big yawn. There was zero interest in that, either [from] the commissioners who for some reason invited me, or [from] a lot of the staff people who were there. I just said their document was full of holes, but there was no interest as to asking why, or can you tell us what's wrong, or anything like that.

Reason: Is traditional planning becoming inconsequential? Are today's academic planners comparable to the slide-rule designers of 20 years ago, preparing to offer a product which has no market?

Gordon: We are trending away from planners in the traditional form, who primarily serve the interests of municipalities. But property arrangements are coming on line which require the developer to wear the planner's hat or the planner to wear the developer's hat. You could call this role "planning," but it's not traditional or public-sector planning.

People who are savvy enough to see the opportunities may be called planners, but they are less likely to operate in city hall and are more likely to operate in a development group, to arrange the types of developments that are successful. They will need a more sophisticated range of skills.

Maybe the world is changing so fast that what's coming out of the academy will lag behind [what the real world demands]. Maybe students will come out of the academy being trained in one way and find, once they leave, they need skills that direct them in another.

But that may be true of any number of other disciplines. It may be a problem professional schools in general face. We know universities are having a hard time keeping up. That's why we have think tanks [laughs].

"We are trending away from planners in the traditional form, who primarily serve the interests of municipalities. But property arrangements are coming on line which require the developer to wear the planner's hat or the planner to wear the developer's hat. You could call this role 'planning,' but it's not traditional or public-sector planning."

Clients From Hell

Mr. President, you should have listened to us.

By Michael McMenamin

The decision in the Paula Jones case came as a big surprise. It shouldn't have. Heaven knows we here at REASON tried to do our civic duty, unpleasant as it was, nearly four years ago—we told President Clinton how he could beat the rap with minimal political fallout. (See "Defending The President," August/September 1994, available at www.reason.com/9408/mcmenamin.html.)

Did he listen? Judge for yourself. Rather than fork over the price of a REASON subscription, Clinton chose (a) to hire one of Washington's highest-priced lawyers with, at the time he was hired, precious little experience in sexual harassment law, and (b) to spend in excess of $4 million in legal fees for what should otherwise have been a routine case costing him less than $100,000. In the process, Clinton has placed his presidency in peril. And for what? While it couldn't happen to a more deserving guy, it didn't have to be this way. At REASON, we don't need hindsight to conclude that Clinton unwisely chose to utilize Nixonian strategy and tactics while ignoring his strongest issue—sexual harassment law was on his side, even if Paula was telling the truth. Indictment or impeachment looms large over his lame-duck presidency as a consequence.

What REASON said on quid pro quo harassment: *Jones claims [she was given] a job transfer and failed to receive merit pay increases in retaliation for having turned Clinton down. Most of what we will need should be found in Jones's personnel file with the Arkansas state government. If it contains a legitimate, non-discriminatory reason for her transfer, we are halfway home....As for the pay claim, there already have been news reports that Jones received at least one merit increase and three cost-of-living increases in less than two years. If we can prove all this, her quid pro quo claim is in deep trouble.*

What Judge Susan Wright said: "The Court has carefully reviewed the record in this case and finds nothing in plaintiff's employment records, her own testimony, or the testimony of her supervisors showing that plaintiff's reaction to Governor Clinton's alleged advances affected tangible aspects of her compensation, terms, conditions, or privileges of employment."

What REASON said on hostile environment sexual harassment: *Our argument here is that what Clinton is claimed to have done is* not, *repeat* not, *illegal sexual harassment. Boorish, bad taste, clumsy—but not illegal....Clinton's alleged conduct is obviously more egregious [than that of Clarence Thomas and Robert Packwood] but still eminently defendable under existing law. But our real ace in the hole, what's going to get us out of this case quickly, is one additional and critical fact: It only happened once. Not one federal court has ever found a single incident to be sufficiently severe to constitute a hostile environment, even though some federal courts have admitted that a single severe incident—for example, rape or violent sexual assault—*could *do so.*

What Judge Wright said: "While the alleged incident in the hotel, if true, was certainly boorish and offensive, the Court has already found that the Governor's alleged conduct does not constitute sexual assault. This is thus not one of those exceptional cases in which a single incident of sexual harassment, such as an assault, was deemed sufficient to state the claim of hostile work environment sexual harassment."

OK, you say, if it was that obvious four years ago how strong Clinton's legal position was (and it *was* that obvious), why did the case take so long? Two answers: Bad strategy. And even worse tactics.

REASON's advice on strategy: *We're talking strategy, not public relations. And our strategy is simple. It's to win. At the earliest possible time. And before the plaintiff has much opportunity to take sworn testimony from potentially embarrassing witnesses like state troopers, Gennifer Flowers, and other Clinton mistresses.*

Clinton's strategy: It's not clear, even in hindsight, that Clinton and his legal team had a coherent strategy other than stall, stonewall, delay, and win at the last possible moment, all the while ignoring that such a course could inflict maximum damage on the presidency.

REASON's advice on asserting presidential immunity: *What about presidential immunity? The technical legal phrase is "the Nixon gambit." Should we use it? Well, we could....But it would be wrong, that's for sure. It's a delaying tactic, and it's bad public relations....All that guarantees is that this case is going to be around for the next two years, through the 1996 presidential election. So keep in mind our strategy: It's win, stupid, as soon as we can. We*

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HENRY PAYNE

don't need delays.

What Clinton did: Well, he couldn't resist pulling a Nixon. So the Supreme Court knocked him down 9–0, and the case hung around long enough for Lewinsky and Tripp to surface. And now he's making the same Nixonian mistake again by claiming executive privilege in connection with Ken Starr's criminal obstruction of justice investigation involving, among other things, someone close to Clinton preparing "talking points" for Monica to deliver to Tripp to change her testimony about Kathleen Willey. When this reaches the Supreme Court, Clinton will again lose 9–0.

REASON's advice on pre-trial tactics: *Clinton's lawyer, Bob Bennett, is in the Washington office of a huge New York law firm known for its hardball, take-no-prisoners litigation style. He might well take the same approach here and harass Jones and her lawyers by burying them in paper with motions, briefs, document requests, interrogatories, requests for admissions, and deposition notices—all the weapons in the modern litigator's arsenal. He might well do that, but it would be a mistake. Why? Keep in mind our strategy. We want a quick victory before Jones's lawyers have a chance to take their own depositions—testimony under oath—of Arkansas state troopers, Gennifer Flowers, and other assorted Clinton mistresses.*

What Clinton did: No weapon in the modern litigator's arsenal was left unused by Clinton's lawyers. And by not going for a quick victory, Clinton had his own deposition taken, exposing himself, so to speak, to Ken Starr's investigation of perjury charges against him.

REASON's advice on seeking an early deposition of Jones: *[W]e promptly take the depositions of Jones and the Arkansas state employees who ordered her transfer and granted her pay increases. We limit our questions to the oral-sex request, the transfer and merit pay, and whether the hotel incident affected the way she did her job. We then go to the judge and ask her to dismiss the case on the two substantive legal issues we examined earlier—quid pro quo and hostile environment. We also ask the judge to prohibit Jones's lawyers from taking any potentially embarrassing depositions from troopers or bimbos pending her decision on our request.*

What Clinton did: He stalled and delayed, waiting over three years before he deposed Jones. By then, she had changed lawyers, and taken all those "potentially embarrassing depositions from bimbos" we had warned him about. Moreover, giving Jones's lawyers all this time to research Bill's past is exactly what led to Monica Lewinsky, Linda Tripp, Kathleen Willey, Jane Does 1 through 4, and a grand jury investigating Clinton for perjury, suborning perjury, and the obstruction of justice.

Why did Clinton choose a defense which ended up jeopardizing his presidency? Who knows? Maybe it was guilt. Or arrogance. Or paranoia. Maybe all three. Trial lawyers have a saying, "Sometimes you win; sometimes the client loses." It's true more often than you think. In the Paula Jones case, his lawyer won, but Clinton lost—if not his presidency, then certainly his place in history. Like a marriage, you rarely know what really goes on between a lawyer and his client. While some may believe that Bob Bennett's inexperience in employment law hurt his client in the early days of the Jones case, Clinton and his wife were sophisticated clients, Yale lawyers both, and no one can doubt they were calling the shots, not their lawyer. "Clients from hell" is the phrase most often uttered by my sisters and brothers at the bar about those who insist on micromanaging every detail of their case. The Clintons got the defense they deserved. It was the country that deserved better.

Put down the drum. Drop the celebratory cigar. If Jones appeals, do the honorable thing and settle the case. If the CEO of a Fortune 500 company did today what Clinton is accused of, few federal judges would keep that case from a jury.

What Clinton should do now: Put down the drum. Drop the celebratory cigar. Recall Churchill: "In defeat, defiance; in victory, magnanimity." If Jones appeals, do the honorable thing and settle the case. Pay Jones the damages your lawyers discussed earlier and apologize for the pain the ordeal has caused her. Why? Because Jones has a better than even chance of beating you on appeal. You heard it here first. Sexual harassment law is not what is was four years ago. If the CEO of a Fortune 500 company did today what Clinton is accused of, there are few federal judges who would keep that case from a jury. And the U.S. Court of Appeals for the 8th Circuit has not been a friendly venue for Clinton, even if its record on sexual harassment is a conservative one. As we told you four years ago: *"There's always a first time for anything, and the Supreme Court of Michigan has already held that a single incident created a hostile environment."*

So, Mr. President, the choice is yours. Listen to REASON. Or not. Try and get it right this time. You're not in Arkansas any more.

Contributing Editor Michael McMenamin (mtm@walterhav.com) is a lawyer in Cleveland who has defended employment cases in 10 states, including Arkansas.

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Titanic Numbers

The movie's unsinkable hype machine sails on.

By T. Keating Holland

This year's Oscar ceremony added new entries in the impressive list of records set by the movie *Titanic.* The most expensive, highest-grossing film of all time, *Titanic* had already garnered a record number of Oscar nominations when the largest television audience in Oscar history saw James Cameron's epic tie the record for winning the most awards.

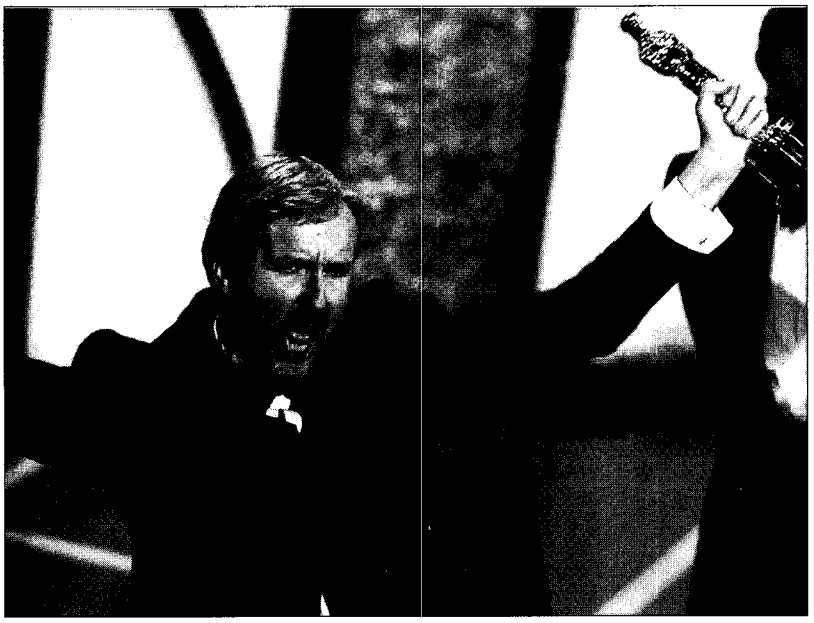
Do all those superlatives thrill and delight you? Then I've got some bad news: Each of those records, while containing a kernel of truth, is mostly the product of Hollywood hype. It's all harmless fun, of course, as long as the subject is a popular movie. But the puffery surrounding *Titanic* is an object lesson in how easy it has become to get the media and the public to uncritically accept just about any list of authoritative-sounding numbers.

Let's start with the amount of money *Titanic* made at the box office—over $500 million at last count. The trouble with that figure is that it doesn't take inflation into account. Most Americans who saw *Titanic* probably paid about $7.00 to do so. By contrast, the average price for a ticket to *Star Wars* two decades ago was less than $5.00—and most people who paid to see *Gone With the Wind* nearly 60 years ago probably paid 50 cents at most. Is it really fair—or honest—to compare the money *Titanic* made today with figures from a time when movies (and nearly everything else) cost a fraction of what they do today?

When *The Washington Post* took a commonly accepted list of box-office receipts and adjusted them for inflation, *Titanic* didn't even rank among the top five. Topping the list was *Gone With the Wind,* which, had it been released today, would have grossed about $863 million domestically. Next on the list were *Star Wars* and *E.T.,* followed by *The Ten Commandments* and *The Sound of Music.* Then comes another Steven Spielberg opus, *Jaws,* and another mid-1960s blockbuster, *Doctor Zhivago. Titanic* currently ranks eighth on this inflation-adjusted list—and while its ticket sales are certain to climb, it's going to have to sell over 50 million more tickets before it can really stake a claim as Hollywood's all-time box office champ.

The claim that *Titanic* was the costliest film of all time holds up only if you believe the studio's rough estimate that it cost $200 million to make the film. But if you accept earlier estimates of about $180 million—announced before the studio realized the perverse public-relations value of having spent too much money—*Titanic* probably ranks second on the list. First place—a dubious distinction in any case—goes to *Cleopatra,* the 1963 film remembered principally today for the fact that Elizabeth Taylor showed more cleavage than Madonna did at this year's Oscar ceremony. Once again, the key factor is adjusting for inflation, which pumps *Cleopatra*'s original $37 million budget up to $194 million in today's dollars.

But the audience for this year's Oscar ceremony was the biggest in history, right? Yes, but that means less than it appears to at first blush. After all, there are more people today than at any time in history. So the raw total of viewers can go up year after year even if there is a drop in the percentage of the entire population watching the telecast, a far more accurate measure of popularity. Just under 35 percent of all American households watched *Titanic* rake in all those Oscars—an impressive figure, but only good enough to crack the top 10, according to *USA Today.* Nine other Oscar ceremonies since 1968 have had higher ratings—led by the 1970 broadcast, which was seen in 43 percent of all American households.



This One's For You, Roger Maris: Director James Cameron brandishes one of *Titanic*'s 11 Oscars. A fine showing, but less impressive on close reading.

AP / WIDE WORLD PHOTOS

Then there are the tallies of Oscar nominations and Oscar victories. It's indisputable that the number of Oscars *Titanic* won tied the record set by *Ben Hur* in 1959. And its 14 nominations equaled the mark set by *All About Eve* in 1950. Here, *Titanic* is the beneficiary of another kind of inflation—the fact that the Academy hands out more Oscars today than in previous years.

Remember when Roger Maris hit 61 home runs in 1961, beating by

one the record Babe Ruth had set in 1927? The problem was that Maris had eight more games in which to hit those home runs. Would Ruth have hit more dingers if he had played more games? We'll never know—but in fairness to the Bambino, the commissioner of baseball originally ordered an asterisk placed next to Maris's figure in the record books.

Titanic's record-tying number of awards and nominations qualify for similar asterisks. *Ben Hur* won 73 percent of the awards it was eligible for; *Titanic* won 64 percent—an awesome performance, but still shy of first place. Or look at it another way: If we count only the categories

Titanic remains a fabulously expensive, wildly successful movie. But many of its "records" are actually hype. Keep _Titanic_ in mind the next time you wonder whether to challenge the numbers a government or business official uses to make a point.

in which *All About Eve* was eligible, *Titanic* only racks up 12 nominations—two fewer than the Bette Davis classic. Would *Ben Hur* have won another Oscar if they had given a statuette for best sound effects editing in 1959? Would *All About Eve* have won more nominations than *Titanic* if there were a category for best makeup in 1950? We'll never know—but it does seem fair to attempt to set the record straight in some way.

When all is said and done, *Titanic* remains a fabulously expensive, wildly successful movie that won a huge number of awards—including the much-coveted Best Picture of the year. But best is not necessarily the same as highest or biggest. Keep *Titanic* in mind the next time you wonder whether to challenge the numbers a government or business official uses to make a point or win an argument. ◆

T. Keating Holland is polling director for CNN.

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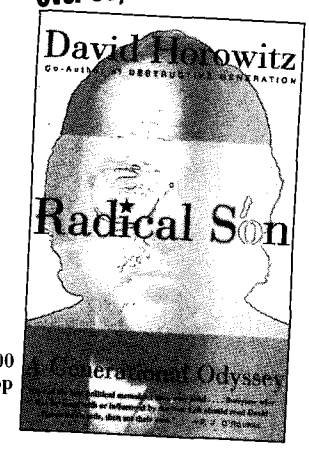

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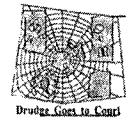
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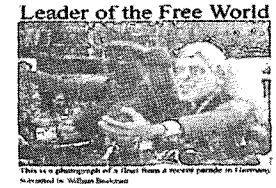

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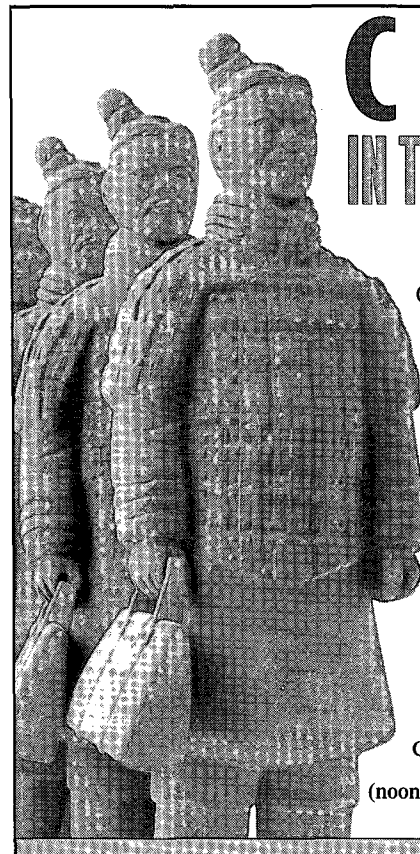

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Clone Wars

The forces of government gather in fear of hypothetical clones.

By Mark D. Eibert

"There are some avenues that should be off limits to science. If scientists will not draw the line for themselves, it is up to the elected representatives of the people to draw it for them."

Thus declared Sen. Christopher "Kit" Bond (R-Mo.) one of the sponsors of S. 1601, the official Republican bill to outlaw human cloning. The bill would impose a 10-year prison sentence on anyone who uses "human somatic cell nuclear transfer technology" to produce an embryo, even if only to study cloning in the laboratory. If enacted into law, the bill would effectively ban all research into the potential benefits of human cloning. Scientists who use the technology for any reason—and infertile women who use it to have children—would go to jail.

Not to be outdone, Democrats have come up with a competing bill. Sens. Ted Kennedy (Mass.) and Dianne Feinstein (Calif.) have proposed S. 1602, which would ban human cloning for at least 10 years. It would allow scientists to conduct limited experiments with cloning in the laboratory, provided any human embryos are destroyed at an early stage rather than implanted into a woman's uterus and allowed to be born.

If the experiment goes too far, the Kennedy-Feinstein bill would impose a $1 million fine and government confiscation of all property, real or personal, used in or derived from the experiment. The same penalties that apply to scientists appear to apply to new parents who might use the technology to have babies.

The near unanimity on Capitol Hill about the need to ban human cloning makes it likely that some sort of bill will be voted on this session and that it will seriously restrict scientists' ability to study human cloning. In the meantime, federal bureaucrats have leapt into the breach. In January, the U.S. Food and Drug Administration announced that it planned to "regulate" (that is, prohibit) human cloning. In the past, the FDA has largely ignored the fertility industry, making no effort to regulate in vitro fertilization, methods for injecting sperm into eggs, and other advanced reproductive technologies that have much in common with cloning techniques.

An FDA spokesperson told me that although Congress never expressly granted the agency jurisdiction over cloning, the FDA can regulate it under its statutory authority over biological products (like vaccines or blood used in transfusions) and drugs. But even Rep. Vernon Ehlers (R-Mich.), one of the most outspoken congressional opponents of cloning, admits that "it's hard to argue that a cloning procedure is a drug." Of course, even if Congress had granted the FDA explicit authority to regulate cloning, such authority would only be valid if Congress had the constitutional power to regulate reproduction—which is itself a highly questionable assumption (more on that later).

Nor have state legislatures been standing still. Effective January 1, California became the first state to outlaw human cloning. California's law defines "cloning" so broadly and inaccurately—as creating children by the transfer of nuclei from *any* type of cell to enucleated eggs—that it also bans a promising new infertility treatment that has nothing to do with cloning. In that new procedure, doctors transfer nuclei from older, dysfunctional eggs (not differentiated adult cells as in cloning) to young, healthy donor eggs, and then inseminate the eggs with the husband's sperm—thus conceiving an ordinary child bearing the genes of both parents. Taking California as their bellwether, many other states are poised to follow in passing very restrictive measures.

What started this unprecedented governmental grab for power over both human reproduction and scientific inquiry? Within days after Dolly, the cloned sheep, made her debut, President Clinton publicly condemned human cloning. He opined that "any discovery that touches upon human creation is not simply a matter of scientific inquiry. It is a matter of morality and spirituality as well. Each human life is unique, born of a miracle that reaches beyond laboratory science."

Clinton then ordered his National Bioethics Advisory Commission to spend all of 90 days studying the issue —after which the board announced that it agreed with Clinton. Thus, Clinton succeeded in framing the debate this way: Human cloning was inherently bad, and the federal government had the power to outlaw it.

But in fact, it's far from clear that the government has such far-reaching authority. Several fundamental

YOU'RE 63 YEARS OLD AND YOU JUST GAVE BIRTH TO TWINS?!
HEAVENS NO, DEARIE. I HAD THE SECOND ONE CLONED.
GOO GOO
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HENRY PAYNE

constitutional principles conflict with any cloning ban. Chief among them are the right of adults to have children and the right of scientists to investigate nature.

The Supreme Court has ruled that every American has a constitutional right to "bear or beget" children. This includes the right of infertile people to use sophisticated medical technologies like in vitro fertilization. As the U.S. District Court for the Northern District of Illinois explained, "Within the cluster of constitutionally protected choices that includes the right to have access to contraceptives, there must be included...the right to submit to a medical procedure that may bring about, rather than prevent, pregnancy."

About 15 percent of Americans are infertile, and doctors often cannot help them. Federal statistics show that in vitro fertilization and related technologies have an average national success rate of less than 20 percent. Similarly, a *Consumer Reports* study concludes that fertility clinics produce babies for only 25 percent of patients. That leaves millions of people who still cannot have children, often because they can't produce viable eggs or sperm, even with fertility drugs. Until recently, their only options have been to adopt or to use eggs or sperm donated by strangers.

Once cloning technology is perfected, however, infertile individuals will no longer need viable eggs or sperm to conceive their own genetic children—any body cell will do. Thus, cloning may soon offer many Americans the only way possible to exercise their constitutional right to reproduce. For them, cloning bans are the practical equivalent of forced sterilization.

In 1942, the Supreme Court struck down a law requiring the sterilization of convicted criminals, holding that procreation is "one of the basic civil rights of man," and that denying convicts the right to have children constitutes "irreparable injury" and "forever deprived [them] of a basic liberty." To uphold a cloning ban, then, a court would have to rule that naturally infertile citizens have less right to try to have children than convicted rapists and child molesters do.

Many politicians and bureaucrats who want to ban human cloning say they need their new powers to "protect" children. Reciting a long list of speculative harms, ranging from possible physical deformities to the psychic pain of being an identical twin, they argue in essence that cloned children would be better off never being born at all.

But politicians and the media have grossly overstated the physical dangers of cloning. The Dolly experiment started with 277 fused eggs, of which only 29 became embryos. All the embryos were transferred to 13 sheep. One became pregnant, with Dolly. The success rate per uterine transfer (one perfect offspring from 13 sheep, with no miscarriages) was better than the early success rates for in vitro fertilization. Subsequent animal experiments in Wisconsin have already made the process much more efficient, and improvements will presumably continue as long as further research is allowed.

Many politicians and bureaucrats who want to ban human cloning say they want to "protect" children. Reciting a long list of speculative harms, ranging from possible physical deformities to the psychic pain of being an identical twin, they argue that cloned children would be better off never being born.

More fundamentally, the government does not have the constitutional authority to decide who gets born—although it once thought it did, a period that constitutes a dark chapter of our national heritage. In the early 20th century, 30 states adopted eugenics laws, which required citizens with conditions thought to be inheritable (insanity, criminal tendencies, retardation, epilepsy, etc.) to be sterilized—partly as a means of "protecting" the unfortunate children from being born.

In 1927, the U.S. Supreme Court upheld such a law, with Oliver Wendell Holmes writing for the majority, "It would be better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind....Three generations of imbeciles are enough."

California's eugenics law in particular was admired and emulated in other countries—including Germany in 1933. But during and after World War II, when Americans learned how the Nazis had used their power to decide who was "perfect" enough to be born, public and judicial opinion about eugenics began to shift. By the 1960s, most of the eugenics laws in this country had been either repealed, fallen into disuse, or were struck down as violating constitutional guarantees of due process and equal protection.

Indeed, those old eugenics laws were a brief deviation from an American tradition that has otherwise been unbroken for over 200 years. In America, it has always been the prospective parents, never the government, who decided how much risk was acceptable for a mother and her baby—even where the potential harm was much more certain and serious than anything threatened by cloning.

Hence, in vitro fertilization and fertility drugs are legal, even though they create much higher risks of miscarriages, multiple births, and associated birth defects. Individuals who themselves have or are known carriers of serious inheritable mental or physical defects such as sickle cell anemia, hemophilia, cystic fibrosis, muscular dystrophy, and Tay-Sachs disease are allowed to reproduce, naturally and through in vitro fertilization, even though they risk having babies with serious, or even fatal, defects or diseases. Older mothers at risk of having babies with Down Syndrome, and even women with AIDS, are also allowed to reproduce, both naturally and artificially. Even if prenatal testing shows a fetus to have a serious defect like Down Syndrome, no law requires the parents to abort it to save it from a life of suffering.

In short, until science revealed that human cloning was possible, society assumed that prospective parents could decide for themselves and their unborn children how much risk and suffering were an acceptable part of life. But in the brave new world of the federal bureaucrat, that assumption no longer holds true.

Ironically, some cloning opponents have turned the eugenics argument on its head, contending that cloning could lead

to "designer children" and superior beings who might one day rule mankind. But allowing infertile individuals to conceive children whose genome is nearly identical to their already existing genomes no more creates "designer children" than it creates "designer parents." More important, these opponents miss the point that only government has the broad coercive power over society as a whole necessary to make eugenics laws aimed at "improving the race." It is those who support laws to ban cloning who are in effect urging the passage of a new eugenics law, not those who want to keep government out of the business of deciding who is perfect enough or socially desirable enough to be born.

Another significant driving force behind attempts to restrict or reverse an expansion in human knowledge stems from religious convictions. Interestingly, there is no necessary theological opposition to cloning: For example, two leading rabbis and a Muslim scholar who testified before the National Bioethics Advisory Commission had no objection to the practice and even advanced religious arguments *for* cloning.

Still, politicians from both major parties have already advanced religious arguments against cloning. President Clinton wants to outlaw cloning as a challenge to "our cherished concepts of faith and humanity." House Majority Leader Dick Armey also opposes cloning, saying that "to be human is to be made in the image and likeness of a loving God," and that "creating multiple copies of God's unique handiwork" is bad for a variety of reasons. Senator Bond warns that "humans are not God and they should not be allowed to play God"—a formulation similar to that of Albert Moraczewski, a theologian with the National Conference of Catholic Bishops, who told the president's commission, "Cloning exceeds the limits of the delegated dominions given to the human race."

Of course, virtually every major medical, scientific, and technological advance in modern history was initially criticized as "playing God." To give just two recent examples, heart transplants and "test tube babies" both faced religious opposition when first introduced. Today, heart transplants save 2,000 lives every year, and in vitro fertilization helped infertile Americans have 11,000 babies in 1995 alone.

Religious belief doesn't require opposition to these sorts of expansions in human knowledge and technology. And basing a cloning ban primarily on religious grounds would seem to violate the Establishment Clause. But that's not the only potential constitutional problem with a ban.

Many courts and commentators say that a constitutional right of scientific inquiry is inherent in the rights of free speech and personal liberty. To be sure, certain governmental attempts to restrict the methods scientists can use have been upheld—for example, regulations requiring free and informed consent by experimental subjects. But those have to do with protecting the rights of others. Cloning bans try to stop research that everyone directly concerned wants to continue. As one member of the National Bioethics Advisory Commission observed, if the group's recommendation to ban cloning is enacted, it would apparently be the first time in American history that an entire field of medical research has been outlawed.

The fear of cloning is already bearing bitter fruit: unprecedented extensions of government power, based either on unlikely nightmare scenarios or on an unreasoning fear that humans were "not meant" to know or do certain things.

Prohibiting scientific and medical activities would also raise troubling enforcement issues. How exactly would the FBI—in its new role as "reproductive police" and scientific overseer—learn, then prove, that scientists, physicians, or parents were violating the ban? Would they raid research laboratories and universities? Seize and read the private medical records of infertility patients? Burst into operating rooms with their guns drawn? Grill new mothers about how their babies were conceived? Offer doctors reduced sentences for testifying against the patients whose babies they delivered? And would the government really confiscate, say, Stanford University Medical Center, if one of its many researchers or clinicians "goes too far"?

The year since the announcement of Dolly's birth has seen unprecedented efforts by government to expand its power over both human reproduction and science. Decisions traditionally made by individuals—such as whether and how to have children, or to study the secrets of nature—have suddenly been recast as political decisions to be made in Washington.

Human cloning, when it actually arrives, is not apt to have dire consequences. Children conceived through cloning technology will be not "Xerox copies" but unique individuals with their own personalities and full human rights. Once this basic fact is understood, the only people likely to be interested in creating children through cloning technology are incurably infertile individuals. There are already tens of millions of identical twins walking the earth, and they have posed no threat so far to God, the family, or country. A few more twins, born to parents who desperately want to have, raise, and love them as their own children, will hardly be noticed.

As for the nightmare fantasies spun by cloning opponents, even the president's special commission has admitted that fears of cloning being used to create hordes of Hitlers or armies of identical slaves are "based...on gross misunderstandings of human biology and psychology." And laws already prohibit criminal masterminds from holding slaves, abusing children, or cutting up people for spare body parts.

As harmless as the fact of cloning may be, the fear of cloning is already bearing bitter fruit: unprecedented extensions of government power, based either on unlikely nightmare scenarios or on an unreasoning fear that humans were "not meant" to know or do certain things. Far from protecting the "sanctity" of human life, such an attitude, if consistently applied, would doom the human race to a "natural" state of misery.

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Rebel Yell

Tennesseeans fight back against the conquering cities.

By Jesse Walker

Most city officials in America, whatever their political party, share certain fundamental beliefs. They believe they have a right to annex any outlying area with an appealing tax base, then take their time delivering the services those taxes are supposed to pay for. And they believe they have a right to grab any parcel for which they might have a use—to seize a future landfill site, for example, before subjecting it to eminent domain. They rarely have trouble doing any of this, since state laws on annexation are usually written by people with the same beliefs.

But last year in Tennessee, the world turned upside down; the balance of power swung away from city leaders and toward residents of the areas they covet. For a few months, Tennesseans glimpsed the political order under which people actually want to live. It's somewhat different from the one officials have been imposing.

Last year in Tennessee, the balance of power swung away from city leaders and toward residents of the areas they covet. For a few months, Tennesseans glimpsed the political order under which people actually want to live. It's different from the one officials have been imposing.

The story began in Fayette County, in the western part of the state. In 1996, the town of Oakland decided to annex a strip of highway that cut straight through the tiny rural community of Hickory Withe, splitting the latter in half. The people of Hickory Withe had no say in the matter: By Tennessee law, cities can take over any area within three miles of their borders (five miles if the city is as big as Chattanooga). All it takes is a vote of the conquering government. Tennessee is one of six states in which the people being annexed need not be consulted. If the annexees don't like it, their only recourse is to move—or fight it out in the courts, a lengthy and sometimes prohibitively expensive process.

But it so happens that Tennessee's lieutenant governor, John Wilder, comes from Fayette County. He was sympathetic to Hickory Withe's troubles and decided to help. Oakland wouldn't be able to annex any of Hickory Withe if the latter were itself incorporated. But it was too small (under Tennessee law, you need at least 1,500 citizens to incorporate) and too close to Oakland (new towns must be at least three miles from other municipalities). So Wilder sponsored a bill that would have made an exception for his former neighbors.

When it looked like that law would be too narrow to pass constitutional muster, Wilson drafted a new version that made it easier for *any* community to incorporate.

The new bill reduced the minimum number of citizens needed to start a town from 1,500 to 225. It also got rid of the rules restricting how close a new town could be to an existing municipality. On top of that, it gave new incorporations priority over annexation attempts. The new arrangement would last only a year, giving Hickory Withe time to incorporate without permanently tipping the balance of power away from cities.

The law passed quietly, entering the books in early 1997 under the bland name Public Chapter 98. If their later protests are to be believed, many legislators didn't even realize what they had voted for.

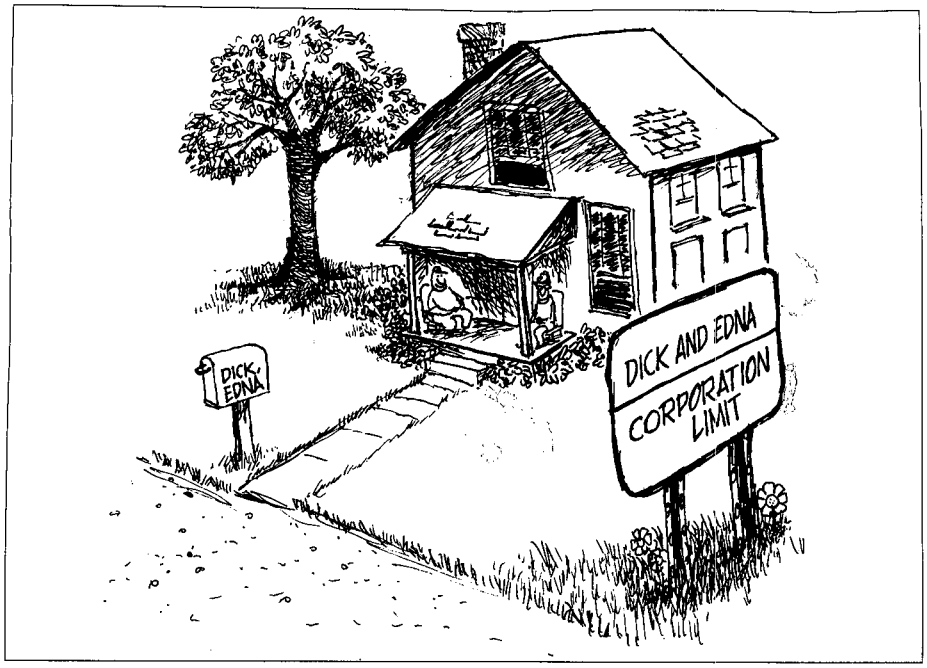
But the Tennessee Municipal League, the cities' lobbying arm, knew what the change meant: trouble. If word got out, it would be easy for rural and suburban communities to protect themselves against future annexations. On the other hand, the press hadn't paid any attention to the reforms, and the people who'd benefit weren't the kind of folks who kept up with such things. The Municipal League decided to keep quiet and wait for the law to expire.

That seemed like a good strategy, until lawyer Gordon Olswing overheard a Municipal League lobbyist fretting over Chapter 98 at a cocktail party. Word got out, and suddenly every Tom, Dick, and 223-plus Harrys was queueing up to start a new town. More than a dozen communities in Shelby County filed for incorporation, lest they be swallowed by nearby Memphis.

That city has a long history of annexing outlying neighborhoods, sucking up their taxes and then short-changing them on services. Local journalist Chris Lawrence, curator of the *MemphisWatch* Web site, offers two examples: "The recent annexation of the Wolfchase Galleria area has reduced police coverage to one police car per shift; the area's fire coverage is two Memphis firefighters in a pickup truck followed by a county crew to do the actual work." Furthermore, the Memphis schools are in the bottom third of the country; the county system is in the top third.

Not surprisingly, Shelby County residents jumped at the chance to ward off their hungry neighbor—and, sometimes, to ward off each other. After a collection of communities filed to incorporate as the city of New Forest Hills, part of the proposed city—Aintree Farms, a subdivision of about 300 people—declared that it would rather be a town of its own.

Because Memphis is poor and predominantly black, some city officials have argued that the incorporationists are nothing more than white-flight refugees shielding themselves from the Negro hordes. The thing is, a lot of the suburbanites are black. Hickory Hill, a particularly noisy independence-minded suburb, is 40 percent



African-American; had it succeeded in incorporating, its school system would have been 60 percent black.

The movement wasn't limited to the Memphis area. In Carter County in the Southern Appalachians, a *building* filed for incorporation. The owners of the 216-unit Overlook Apartments decided to use Chapter 98 to shield themselves from nearby Elizabethton. Under the new system, a district could schedule a vote on incorporation by collecting signatures from one-third of its registered voters. With only 40 registered voters in the complex, that didn't take much work.

Residents of an unincorporated Sumner County neighborhood—home to country music stars Loretta Lynn and David Allan Coe, among others—decided they could use the law to their advantage, even though they didn't really want to become an independent city. Two towns, Goodlettsville and Hendersonville, had long been fighting for the right to annex the area, a little village near Nashville. Local opinion strongly favored Goodlettsville, a neighborly overlord at a mere 75 feet away. (Hendersonville, by contrast, was a distant seven miles.) Yet under state law, the people of Sumner County had no say in the matter. So they decided to incorporate as Mooneyville (after Loretta's late husband, Oliver "Mooney" Lynn) and then petition to be merged with the city of their choice.

Other areas—such as Middle Valley, near Chattanooga—didn't face an immediate threat of annexation but filed anyway, just in case any nearby city decided to grab them in the future. In those places, the debate often centered around which was worse: the risk of being swallowed by a city that might never come knocking or the taxes that a new town government would probably impose. As a result, the public discussion sometimes struck a fatalistic note. "I'm sure our taxes are going to go up whichever way it goes," one voter told the *Chattanooga Times*. "I just don't want to be annexed by Chattanooga."

The issue turned out to be moot. Reviled by the political establishment, Public Chapter 98 died on November 19, 1997, when the Tennessee Supreme Court struck it down. The "body of the Act," the court explained, was "broader than its caption," a no-no under the Tennessee Constitution. In other words, when legislators passed the law, they might not have realized what the bill said. Thus, the court declared, it was unconstitutional. The law died, and the young towns disappeared.

But the struggle over annexation isn't dead. Two veterans of last year's fight, Tom and Denise Jeanette, have founded a new lobbying organization, the Tennessee Suburban League. "The cities spend about a million dollars a year lobbying the legislature," says Tom, a computer engineer and 14-year resident of Hickory Hill. "The counties have at least a half-dozen different lobbying organizations. And there's been no one to represent the people—the residents of the rural and suburban areas."

The league wants to limit cities' ability to annex across county lines; to give people the right to vote on whether or not they'll be annexed; to require cities to present a plan to provide services to new territories within five years of annexation; and to preserve the right to a jury trial for citizens suing to prevent an annexation. Denise spends about three days a week in Nashville, "trying to put a human face" on the issue. She reports that legislators have welcomed her input.

Still, the reforms lawmakers are currently considering don't reflect that open spirit. One bill limits annexations across county lines but otherwise leaves the old problems in place. Worse yet, it introduces some new ones. It would require cities and counties to produce 20-year growth plans —a popular nostrum in urban policy circles, and a practical impossibility. It would also saddle cities with "urban growth boundaries." Despite their name, those lines don't restrict the ability of cities to expand; they restrict the right of rural and suburban residents to build on their property. The bill also prohibits rural areas from putting in sewer lines. In the Volunteer State, it seems, sewage systems are for cities only.

The other major bill is a compromise between the cities and the counties. As such, it deals with revenue-sharing issues but leaves residents' concerns mostly unaddressed. It eliminates the right to a jury trial and shifts the burden of proof in court. Cities would no longer have to demonstrate that an annexation is reasonable; plaintiffs would have to demonstrate that it is not reasonable.

"We're taking a balanced view," says Tom Jeanette. "Cities need to be successful, counties need to be successful—and suburban and rural residents have rights that need to be protected. In the past, the answer's always been just to move, but we like the areas we're in. We want to stay put. And fight for what's right." ◆

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CHIP BOK

Carolina Dreamin'

A German immigrant opens a brew pub on Roanoke Island—and lives to tell the tale.

By Max Schulz

Roanoke Island, on North Carolina's Outer Banks, hasn't always been hospitable to immigrants. In 1587 a group of British settlers sponsored by Sir Walter Raleigh landed there. Three years later, the colony had disappeared without a trace.

The climate for newcomers was appreciably less hostile by 1986, when German immigrant Uli Bennewitz started a brew pub there. Yet he encountered one obstacle after another, including jealous monopolists, archaic laws, bizarre federal regulations, and local suspicions. His story illustrates the unnecessary hardships that entrepreneurs face even when they are ultimately successful.

When Bennewitz decided to open a microbrewery and Bavarian restaurant in Manteo, Roanoke Island's largest town, the craft beer craze had barely begun, and he expected the difficulty of cultivating a market. But he never anticipated the regulatory and social hassles. "If I had had any idea of what I would have to go through, and still be going through," he says, "I just wouldn't have done it."

From the beginning, the deck was stacked against the Weeping Radish (named for a snack served in German beer halls). North Carolina law did not allow breweries to sell customers beer made on the premises. Brewers could sell only to wholesalers, who in turn would sell to retailers. The purpose of this rule was to check the power of large-volume brewers, but over time it created a group of powerful wholesalers.

With the naiveté of someone from another country, Bennewitz set out to change the law. He met with a representative of the state Alcoholic Beverage Control board, and together they drafted a simple bill that would allow small breweries to sell beer directly to the public. This would permit Bennewitz to bypass the wholesalers and sell his own beer in the Weeping Radish's restaurant and adjoining pub. The state senator for Manteo, sensing economic opportunity knocking on his district's door, gladly agreed to sponsor the bill.

Not so fast, said the wholesalers, who sent their lobbyist to find out how much beer the Weeping Radish planned to brew. The wholesalers wouldn't sign off on the bill unless it set a limit low enough to protect their monopoly. New to the business of brewing beer, Bennewitz had no idea what quantity he would make. He called his brother in Germany, who had arranged for him to buy and ship the necessary equipment to America, and asked him. No more than 10,000 gallons a year, his brother said.

One regulation required brewers to handle their beer in sealed, portable containers. The Weeping Radish put its tanks on wheels, even though they would never move an inch.

Bennewitz shrewdly told the wholesalers' representative he intended to brew 100,000 gallons a year. After some tense negotiations, they agreed on a ceiling of 62,000 gallons. The wholesalers' lobbyist, Bennewitz notes, "could go back to his bosses and brag about knocking us down a third. Meanwhile, we were allowed to sell six times more than we would ever be able to make."

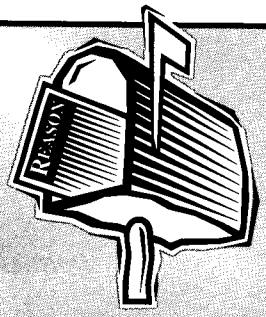
That was only one hurdle. Next, the Weeping Radish had to satisfy officials at the Bureau of Alcohol, Tobacco, and Firearms, who were as unaccustomed to dealing with microbreweries as Bennewitz was to running one. Far from being "jackbooted thugs," as some gun rights activists have dubbed the bureau's representatives, the agents he dealt with were helpful and easygoing. The problem was that BATF rules and regulations were meant for large breweries capable of producing more beer in one day than the Weeping Radish could make in a year. Most federal laws concerning alcohol dated back to the end of Prohibition and hadn't been updated much since.

One regulation required brewers to handle and transport their beer in sealed, portable containers. To comply, the Weeping Radish tore down its tanks and put them on wheels, despite the fact that they would never move an inch.

Another regulation demanded that certain production areas be walled off so that beer would not be served in the same area where it was dispensed from tanks. The BATF had long allowed cigarette manufacturers to skirt similar requirements by pasting white lines on the floor in lieu of walls. The Weeping Radish followed suit, even running one line through the dining room. Kegs couldn't be moved on trucks or dollies from the brewing area to the bar without being unloaded, carried by hand over these "walls," and then reloaded for the remaining few feet of the journey.

In Germany, where the government is the arbiter of quality, brewers have to comply with the *Reinheitsgebot*, or purity law. The state decides which beer is good enough to be sold, rather than letting consumers judge for themselves. In Dare County, North Carolina (which includes Roanoke Island), the government has declared itself the arbiter of morality. That means using the law to curtail activities that offend people's sensibilities.

This mission has led to some perverse consequences. In North Carolina, some counties remain dry 65 years after the repeal of Prohibition. Others prohibit liquor from being sold anywhere but in state-run stores. Under a Dare County ordinance, restaurant patrons may bring their own liquor, but the bottle has to be kept in a



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Don't Cry For The Weeping Radish: After battling political and moral regulators, Ulli Bennewitz's pub seems unlikely to go the way of Roanoke Island's first colony.

brown bag, and it has to stay under the table at all times, even for pouring. When a customer finishes his meal, he may not take the bottle out with him because another law forbids carrying an open bottle of booze. But he's not allowed to leave liquor behind, either. So he has to drink every drop to legally exit the establishment.

Since Bennewitz was in the business of selling beer, such restrictions did not bother him much. But the brown bag rule reflects anti-alcohol attitudes with which he did have to contend. A local newspaper made much of the Weeping Radish's attempt to rent space in a state-owned seafood warehouse, implying that such an arrangement might send an approving message about alcohol. Never mind that the warehouse had sat mostly empty since it was built 15 years before. Bennewitz also complains about the billboard owner who wouldn't allow him to mention the words *beer* or *brewery* in his ad, though the local Holiday Inn was permitted to tout its "lounge."

Despite the regulatory hoops and anti-alcohol sentiment that Bennewitz had to battle, after 12 years the Weeping Radish seems unlikely to go the way of the first Roanoke colony. He has opened a restaurant further north on the Outer Banks, and a new facility in Wanchese, North Carolina, stores his beer for aging and handles shipping orders. He hopes to expand his distribution into the lucrative market in the nearby Tidewater region, which will mean navigating the maze of Virginia's state and local regulations.

Despite his assertion that he wouldn't do it again, Bennewitz marvels at his only-in-America success: "What could be more ridiculous, after all, than opening a Bavarian restaurant on the Outer Banks!" Entrepreneurs who are brave enough to imagine such possibilities face a big enough challenge without the meddling of bureaucrats and busybodies.

Max Schulz (millyon@aol.com) is an adjunct scholar with the Frontiers of Freedom Institute.

COURTESY THE WEEPING RADISH

Thanks for the Memories

How lawyers get the testimony they want.

By Walter Olson

Read out loud, Zippergate's famous "talking points" memo might be mistaken for a stage hypnotist's spiel. "You did not see [Kathleen Willey] go in or see her come out" of the Oval Office, the script declares with serene suggestiveness. "You now find it completely plausible that she herself smeared her lipstick, untucked her blouse, etc." You are relaxed, Ms. Tripp, calm and drowsy...and now some bad old memories can slip away, while other better ones emerge to take their place....

Many observers have been startled by just how breezy our legal culture can be about the suborning of perjury. Sure, as Vernon Jordan is alleged to have helpfully assured Monica Lewinsky, perjury seldom gets prosecuted in civil cases. But you'd still think there'd be some surviving taboo on coordinating others' false stories, with its extra element of planning and forethought. If you wonder what passes for acceptable witness preparation in our litigation system today, though, it's worth catching up on the latest developments in a case that came to light last year in Texas.

The deposition of Willie Roy Reathy on August 27, 1997, in Corpus Christi looked to be another routine skirmish in the asbestos wars. In recent decades tens of thousands of industrial workers have sued hundreds of companies that sold products containing asbestos. In the strongest such cases, a worker has unquestionably been exposed to high levels of asbestos dust and later develops a lethal disease clearly linked to asbestos (such as mesothelioma, a fatal cancer). He sues not his employer—that would bring him under worker's compensation law, with its limited awards—but instead the manufacturers.

Only a small minority of today's suits actually fit this profile. When entrepreneurial law firms came to realize the potential in this line of work they also got a lot less choosy about recruitment. Some now park vans in front of union halls and herd workers through for quickie x-rays which nearly always, in the view of the lawyers' hired medics, indicate lung dysfunction—even if no subpar functioning at all is detectable to defendants' doctors. The process started with occupations that worked closely with loose asbestos, such as ship insulators and pipefitters, but has since spread ever-wider in concentric rings, to the point where you may hop on the claimant gravy train if you spent one summer in college helping to renovate a library. Meanwhile, most of the major asbestos makers of yesteryear having gone bankrupt, the game is increasingly one of chasing down companies that never thought they were in the asbestos business at all: makers of ceiling tiles that contained a small admixture of the substance for fire protection, family-owned wholesalers that handled thousands of different industrial products back in the 1940s, and so forth.

If you wonder what passes for acceptable witness preparation in our litigation system today, it's worth catching up on the latest developments in a case that came to light last year in Texas.

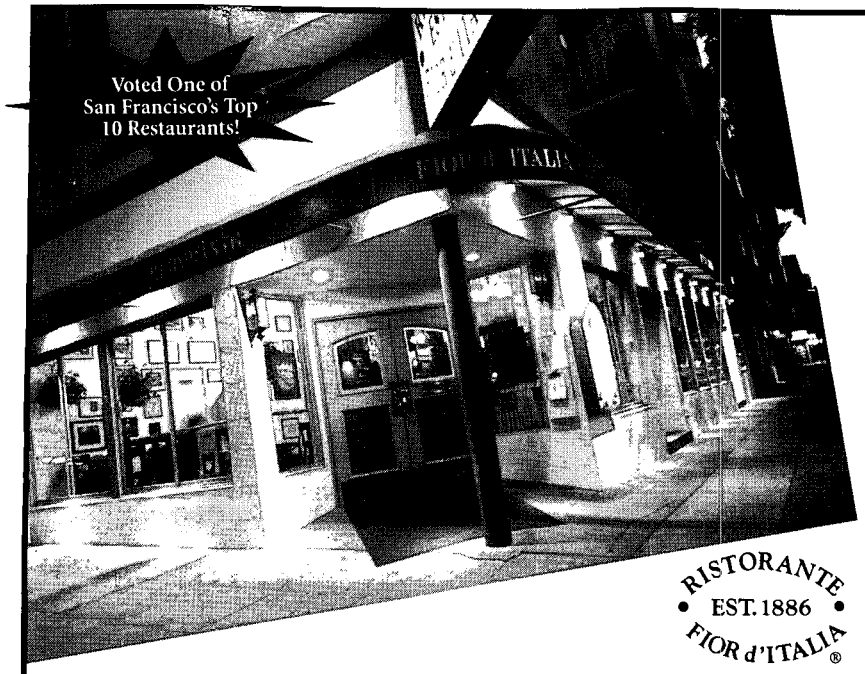
In the Corpus Christi case, plaintiff Reathy was represented by Baron & Budd, a 40-lawyer Dallas firm that is said to be one of the nation's most lucrative injury practices. Reportedly the firm had sent to Reathy's deposition a first-year associate who proceeded to hand over to the opposing lawyer a stack of papers without realizing it contained an extra document he certainly did not intend to hand over.

That document was a 20-page memo with the title "Preparing for Your Deposition," and it consisted largely of talking points. "It is important to maintain that you NEVER saw any labels on asbestos products that said WARNING or DANGER," the memo advises. "Do NOT say you saw more of one brand than another, or that one brand was more commonly used than another....You NEVER want to give specific quantities or percentages of any product names....Be CONFIDENT that you saw just as much of one brand as all the others. All the manufacturers sued in your case should share the blame equally!"

"Product identification" is typically a crucial issue in asbestos suits. Prevailing legal doctrine requires a showing that the complainant was exposed to particular defendants' products, and the more different makers the better from the lawyers' perspective. Seldom is there any independent way to verify which products were used at workplaces decades earlier, which can leave workers' memories as the only evidence.

"How well you know the name of each product and how you were exposed to it will determine whether that defendant will want to offer you a settlement," the document explains. "You will be required [to] do all this from MEMORY, which is why you MUST start studying your Work History Sheets NOW!" (The Work History Sheets incorporated the planned allegations of which products would be said to have been encountered at which workplaces.)

What if defense lawyers get skeptical? "You may be asked how you are able to recall so many product names. The best answer is to say that you recall seeing the names on the containers or on the product itself. The more you thought about it, the more you remembered!" And quit worrying: "Keep in mind that these attorneys are very young and WERE NOT PRESENT at the jobsites you worked at. They have NO RECORDS to tell them what products were used on a particular job, even if they act like they do....The best way to respond to this kind of question is 'Yes,



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I am SURE I saw it there!' or 'I KNOW it was that brand because I saw the name on the container.' "

Over the years asbestos defendants had grown quite certain that they were dealing with a huge volume of less-than-forthright plaintiff testimony, as a teacher grows suspicious when the class hands in identically worded essays. As Johns-Manville and other leading manufacturers of asbestos went bankrupt, for example, new complainants abruptly ceased remembering working with those makers' brands.

"Remember to say you saw the NAMES on the BOXES," the memo says of pipe covering and block insulation—the problem here being that workers might "remember" seeing brand names on these products themselves when in fact they weren't stamped with makers' names. Although some of the highest dust exposures occurred during demolition work, "Unless your Baron & Budd attorney tells you otherwise, testify ONLY about INSTALLATION of NEW asbestos material, NOT tear-out of the OLD stuff. This is because it is almost impossible to prove what brand of material was being torn out...."

Defense attorneys may try to ask trick questions about products that weren't in use during your time on the job, but your lawyer will object: "[L]isten carefully to your Baron & Budd attorney's suggestion. Some examples are: 'You didn't see that product before the 1960s, right?' Your attorney will not ask you to say something wrong." That's why you should pause after any question: "Make sure you give your attorney TIME to object before blurting out an answer!"

Make sure to keep your lawyers' options open. "You should name all the products YOU RECALL, but be sure to say there were others, too. This way, your coworkers can testify about brands you cannot remember yourself....It is VERY important to say that there were LOTS of other brands. You just cannot recall ALL the names!" Whatever you do, brazen it out: "You must be CONFIDENT about the NAMES of each product, what TYPE of product it was, how it was PACKAGED, who used it and HOW it was used...." And while you may have to let the opposition see your work history sheets, "Any other notes, such as what you are reading right

now, are 'privileged' and should never be mentioned."

How did Baron & Budd react when this document came to public light? With the same strategy pursued so brilliantly by the Clinton White House: not only refusing to apologize for anything, but proposing that *they* are the real victims.

To begin with, attorney Frederick Baron declared that the artfully written document—which was prominently marked "Attorney Work Product," and reflected close knowledge of the legal impact of possible testimonial content—was in fact the production of a rogue, unsupervised legal assistant. (But then, some have suggested that Monica Lewinsky wrote the "talking points" herself.) In fact, Baron maintained, none of the firm's lawyers knew of the document's use, it had only been used in a small number of cases by this one paralegal in the past year or two, and besides which he would never knowing employ anyone he caught suborning false testimony. (The memo itself, incidentally, amusingly anticipates this tendency to lay the blame on the firm's non-attorney employees: "If there is a MISTAKE on your Work History Sheets, explain that the 'girl from Baron & Budd' must have misunderstood what you told her when she wrote it down.")

So are these explanations for real? You might think the answer would be to conduct some sort of investigation into such questions as how and how widely the document was used, whether the firm's lawyers were ignorant of its use, whether there were other, similar versions of the memo, whether any such versions were shared among other law firms, and so forth. But Baron & Budd has proceeded to block any such probe. In fact, its lawyers have been refusing to let their clients answer questions about whether they've seen the memo.

In fact, Baron & Budd argues, the real scandal is that *their* privacy has been invaded—a position that has had some success. True, in December Bexar County Judge Michael Peden ruled against the firm's claim that the memo was protected by attorney-client privilege—"No privilege attaches to the Deposition Script because it also evidences a plan to commit a crime or fraud within the meaning" of the Texas Rules of Civil Evidence. But in January a state appeals court in Austin found the document was privileged "as a confidential communication between an attorney's representative and the client made for the purpose of facilitating the rendition of legal services." In March the full court withdrew that opinion, which had been issued by a panel irregularly constituted of two judges, and ordered a rehearing on the matter. Meanwhile, "Baron & Budd takes the position that any public use of The Document is a breach of B&B's privileges, and we will retaliate against any attorney who uses it," Baron told *Mealey's Asbestos Litigation Reporter.*

Even more colorful developments were afoot in Dallas, where Judge John McClellan Marshall, who presides over a group of Baron asbestos cases, referred the matter to a state bar grievance committee. The

Terming the memo flap "scandalous to the community as well as to the profession," and "an affront to the integrity of the judicial system," a Texas judge referred it to a grand jury for possible prosecution.

Texas Rules of Professional Conduct, like those of other states, provide that, "[a] lawyer shall not...counsel or assist a witness to testify falsely." But in no time at all the bar committee dismissed the complaint. In the view of the State Bar of Texas, the memo apparently revealed no ethical violation worth worrying about. Judge Marshall, evidently nettled at the quick rejection of the bar complaint, proceeded to raise the stakes. Terming the matter "scandalous to the community as well as to the profession," and "an affront to the integrity of the judicial system," he referred it to a grand jury for possible prosecution. Baron proceeded to call Judge Marshall "a fruitcake" and fired off an official complaint against him to the State Commission on Judicial Conduct.

Meanwhile Baron was preparing to proceed with his ultimate line of argument: *There was nothing ethically wrong with the memo in the first place.* He proceeded to obtain opinions in its favor from two University of Texas legal ethics professors, from University of Indiana legal ethics specialist William Hodes, and from Steven McCormick, general counsel of the State Bar of Texas.

Hodes, for example, wrote in an affidavit that he found "nothing improper or unethical" in Baron & Budd's use of the document in the *Reathy* case. "It is...appropriate for a lawyer to instruct his client how to answer questions in accordance with the truth that will best serve his case," Hodes wrote. That affidavit deserves an acid-free mount and mahogany frame: How better to sum up the degree of moral insight and ethical rigor that America's legal academy expects of its members?

Really, we should be grateful to America's lawyers. Not only are they entertaining, but we owe them so many memories.

Contributing Editor Walter Olson (hambo @eci.com) is senior fellow at the Manhattan Institute and author most recently of The Excuse Factory.

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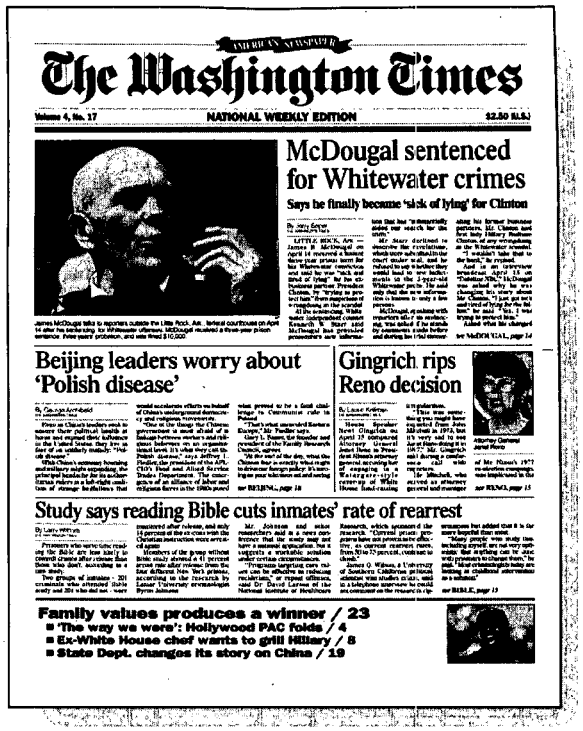
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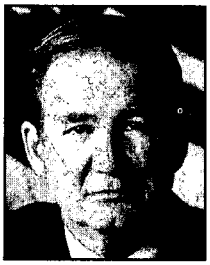

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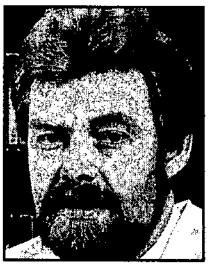

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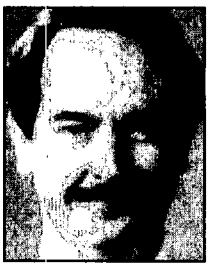

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Send in the Clones

By Ronald Bailey

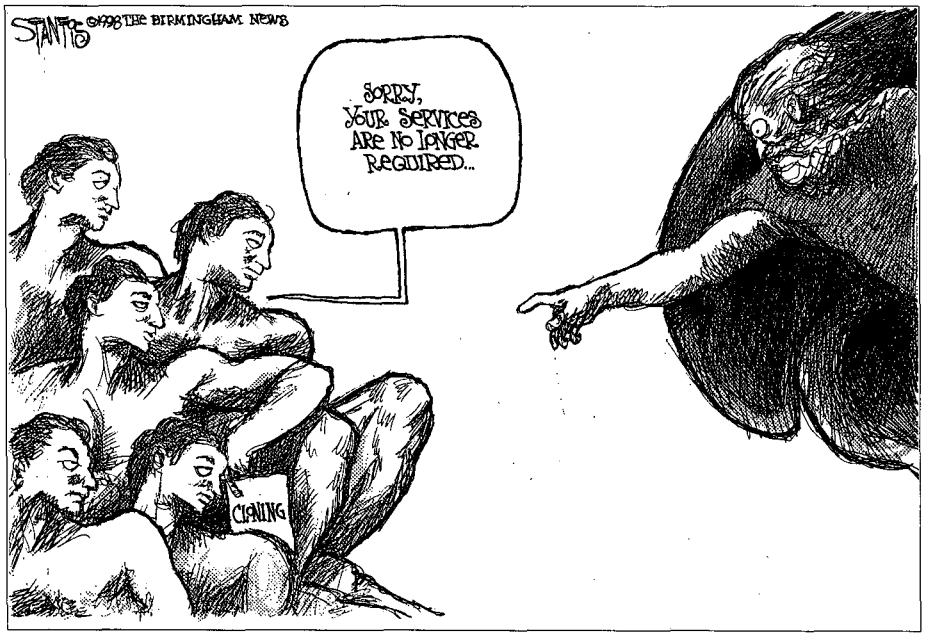
Remaking Eden: Cloning and Beyond in a Brave New World, by Lee Silver, New York: Avon Books, 317 pages, $25.00

Clone: The Road to Dolly and the Path Ahead, by Gina Kolata, New York: William Morrow & Co., 276 pages, $23.00

Cloning human cells could one day save your life and the lives of the people you love. Yet Congress seems hellbent on stopping the medical advances that cloning can make possible. Congress is responding to polls that show most Americans are opposed to the cloning of human beings. But carelessly crafted legislation would restrict not only research leading to the birth of cloned people but research that could find cures for cancer, genetic diseases such as cystic fibrosis, and damaged hearts, livers, and brains.

Now readers interested in this topic have two good, complementary introductions to the science, morality, politics, and future of animal and human cloning. Gina Kolata, who works for *The New York Times*, is one of the best science reporters in America. Lee Silver is a professor in the departments of molecular biology, ecology, and evolutionary biology and the program in neuroscience at Princeton University. Kolata does a particularly good job of describing the science that led up to Dolly, while Silver explores the futuristic medical and reproductive techniques that cloning makes possible.

In February 1997, the Roslin Institute in Scotland, an obscure farm animal research facility, announced that it had succeeded in cloning a sheep from an adult, differentiated cell. The cloned sheep, Dolly, made headlines around the world and launched a fierce debate over the potential uses for this new technology. The breakthrough showed for the first time that genetic information encoded in the DNA of an adult cell could be "reset" and made young again. Once reset, the cells with rejuvenated DNA could produce all of the cells needed to grow a complete organism. "[S]uperficially, it's a step toward immortality," explained Ronald James, whose company, PPL Therapeutics, paid for the cloning research. "And if you take a step toward immortality, everybody stops and takes notice."



SCOTT STANTIS

Since Dolly, much has happened. President Clinton imposed a ban on federally funded cloning research, and Pope John Paul II declared that each human being has a "right to a unique human genome." UNESCO has issued a Universal Declaration on the Human Genome and Human Rights declaring, "Practices which are contrary to human dignity, such as reproductive cloning of human beings, shall not be permitted." The European Union has also adopted a ban.

In the United States, the National Bioethics Advisory Commission issued a report last June calling for federal legislation to ban human cloning for three to five years. "Freelance" physicist Richard Seed created a mini media firestorm in December when he said he was looking for investors to open a cloning clinic. Congressional hearings have been held, and in February the U.S. Senate debated a bill that would ban cloning research on human embryos. Throughout it all, bioethicists have been offering grim warnings about the moral dangers of human cloning.

As Kolata shows, the science of cloning is fascinating. The achievement of Ian Wilmut and his colleagues at the Roslin Institute was the culmination of decades of research on eggs, embryos, and in vitro fertilization. The researchers inserted the nucleus of an adult udder cell into a sheep egg cell whose nucleus had been removed, a technique called "somatic cell nuclear transfer." Once the egg with its new nucleus began to divide, Wilmut implanted the developing embryo into the uterus of another sheep, the surrogate mother who gave birth to Dolly.

If it can be done with sheep, there appears to be no biological reason it cannot be done with human beings. Putting that possibility aside, however, cloning techniques could be the basis for a variety of life-saving medical treatments. Cloning probably will first be used to create animals that excrete important therapeutic human

proteins, such as insulin or interferons, in their milk. This is what Wilmut was trying to do.

Another exciting possibility is that doctors, using somatic cell nuclear transfer, could create embryonic stem (ES) cells, the self-renewing precursors to blood, skin, heart, and nerve cells.

The treatment for leukemia, a cancer in which the bone marrow overproduces white blood cells, could be revolutionized. Today, one of the more successful treatments involves the destruction of a patient's bone marrow through chemotherapy and the transplantation of healthy marrow cells taken from a closely matched donor. The problem is that many leukemia patients die because they can't find appropriate donors. With cloning, healthy marrow cells that are perfect genetic matches for a leukemia patient could be created from the patient's own cells. Doctors could take a skin cell nucleus and implant it in an enucleated human egg, resetting the cell's DNA. Once reset, the cell could become an embryonic stem cell. After the ES cells began to divide, they could be treated with hormones that would cause them to develop into marrow cells, which could then be returned to the patient.

Similarly, islet cells could be created from the skin cells of a diabetic and returned to the patient's pancreas, where they would produce insulin. Eventually, ES cells could be turned into healthy heart or liver cells that could be used to repair tissue damaged by heart attacks or hepatitis.

Congress is considering several bills, sponsored mainly by Republicans, that would ban the research that could lead to these new treatments. Stampeded by the anti-abortion lobby, congressional Republicans want to treat ES cells like human embryos, even though their ultimate form depends entirely on the intentions of the patients and doctors who create them.

Silver highlights the important distinction between growth and development. ES cells can grow and divide into millions of identical cells, but they do not develop into any particular kind of cell until told to do so through biochemical signals. In a sense, the creation of ES cells in vitro would be like enhancing the natural production of ES cells in vivo. ES cells created from a patient's skin to treat disease are no more ethically problematic than veins taken from his legs to be used in a heart bypass operation. Both are the patient's cells, and both are being used for purposes different from their original function.

Down the road, it may be possible to reset cells without using enucleated human ova. Scientists in Wisconsin are doing some promising work using cow eggs to rejuvenate DNA taken from other species. But right now, researchers need to use human eggs in order to learn about the process of resetting cells. Such knowledge could lead to cures for cancer by teaching doctors how to turn off the uncontrolled growth of cancer cells, avoiding the relatively crude radiation and chemotherapy treatments used today. If research using human ova is blocked, the development of new treatments will be delayed, and many people who might have lived will die.

Cloning seems to cause great unease among bioethicists and the general public, but it's not clear exactly why. A clone would be a delayed identical twin of the person from whom the cell's nucleus was taken. A clone is therefore a human being with all of the rights and responsibilities of any other human being.

But what about cloning a complete human being? This prospect seems to cause the greatest unease among bioethicists and the general public, but it's not clear exactly why. A clone would be a delayed identical twin of the person from whom the cell's nucleus was taken. A clone is therefore a human being with all of the rights and responsibilities of any other human being. "How could we expect God to treat anyone born through cloning any different from the rest of us?" asks Ted Peters, a fellow at the Center for Theology and the Natural Sciences and a professor at Pacific Lutheran Seminary. "Surely, they would be just as much a child of God and loved by God. They would have their individuality, they would have their dignity, and certainly they would have their own souls."

The National Bioethics Advisory Commission suggested that human cloning be banned for three to five years on the grounds that it is not yet "safe" for the children who might be born using the procedure. The commission based its decision on the fact that Dolly was born after 277 attempts, which it argued is too high a failure rate when applied to human cloning. But is it really?

Lee Silver notes that hundreds of human eggs and embryos were used before the birth of the first test-tube baby, Louise Joy Brown, in 1978. Dolly was actually the beneficiary of well-established human in vitro fertilization technology: In the 277 tries, only 29 of the fused udder cells actually became embryos, which were implanted in 13 ewes, of which one became pregnant and gave birth. In a sense, this was a perfect success rate, since the only pregnancy resulted in a healthy birth. It is certainly far superior to the success rates achieved in early human IVF efforts. Silver claims that reproductive human cloning is no more dangerous than current human IVF procedures, which result in fewer birth defects than do natural births. An estimated 150,000 test-tube babies have been born worldwide.

Many of the same bioethicists who decried test-tube babies, including Leon Kass of the University of Chicago and Daniel Callahan of the Hastings Institute, are in the forefront of the attempts to ban human cloning. Twenty years ago, these bioluddites portentously warned that test-tube babies would break the natural bonds of family, with unimaginable consequences for society. Although their warnings have proven unjustified, the naysayers are dusting off the old arguments and applying them to this new advance.

The National Bioethics Advisory Commission correctly refused to take a stand on the morality of human cloning, noting our society's diversity of values. The pope is free to advise Roman Catholics about what he believes the proper way to reproduce is, but his values are not universal.

The commission could not find a secular basis for banning the cloning of human beings. After all, who would be hurt by cloning? The person being cloned? Not if he gives permission. The baby? There is

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little reason to believe that "unnatural" methods of reproduction are any more harmful to offspring than the usual way of having children. There is no evidence, for example, that test-tube babies suffer especially high rates of physical or psychological problems.

Try this thought experiment. If tomorrow someone could prove that you were a clone, would you think your life was worth less, that your loves and experiences were devalued? You would be the same person you always were. Nothing would be different simply because you were born from a "previously experienced genome," in the tortured language of the cloning prohibitionists. A clone would likely have no more issues about self-worth and life chances than test-tube babies or adopted children do today.

One often hears that cloning will bring on Aldous Huxley's *Brave New World.* But that is nonsense. Huxley's dystopia was a centrally planned world in which clones were created by the state. In our society, choices will and should be made by individuals who are helping their children have a better life. One day, cloning technology probably will make possible changes in the genomes of embryos. Parents who risk having children with genetic diseases will be able to have the DNA of their prospective children repaired at the embryo stage, protecting them against maladies such as cystic fibrosis, PKU, and Tay-Sachs. A further benefit is that their grandchildren will never contract these diseases.

Parents will not only be able to prevent disease, they may also be able to enhance their children. Parents invest a lot of time, money, and emotional energy in providing good health care and a solid education for their children. If, by tweaking a base pair or two in a child's DNA, parents could boost the kid's intelligence and ensure against genetic diseases, what's so wrong with that? More to the point, who has the right to stop them?

"We control all other aspects of our children's lives and identities through powerful social and environmental influences and, in some cases, with the use of powerful drugs like Ritalin and Prozac," notes Silver. "On what basis can we reject positive genetic influences on a person's essence when we accept the rights of parents to benefit their children in every other way?"

Opponents of cloning talk a lot about hubris. But it takes more than a little hubris to believe you are wise enough to tell other people what is best for them—which is, after all, what a ban on cloning amounts to. What about the human consequences of banning a technology—the death, disease, disability, indignity, unhappiness, and blighted lives that would result from imposing limits on cloning discoveries and advances? Trying to exercise prior restraint on scientific and medical research is fraught with moral peril. Cloning prohibitionists must be held responsible for preventing the discovery of a cure for AIDS, cancer, Tays-Sachs, or heart disease. Their efforts to ban cloning could stop the creation of new medicines that would help millions of people.

Parents invest a lot of time, money, and emotional energy in providing for their children. If, by tweaking a child's DNA, parents could boost the kid's intelligence and ensure against genetic diseases, what's so wrong with that? More to the point, who has the right to stop them?

Some opponents of cloning say it is too risky. But what opponents of a new technology regard as too risky may be acceptable for others. After all, some people parachute out of airplanes, while others won't even ride jetliners. "Risk" is not an objective quality of an object or technology; it is inextricably tied up with one's values. Why should cloning opponents get to impose their values on sick or dying people?

With regard to the perennial argument that cloning might violate "human dignity," bioethicist Ruth Macklin of Albert Einstein Medical College rightly observes that people who are worried about this issue "owe us a more precise account of just what constitutes a violation of human dignity if no one's rights are violated. Dignity is a fuzzy concept and appeals to dignity are often used to substitute for empirical evidence that is lacking or sound arguments that cannot be mustered." After all, what is so dignified about dying of cystic fibrosis, diabetes, or cancer?

Unfortunately, Silver mars his otherwise excellent book with a futuristic horror story of his own. He suggests that a few centuries from now, there will be a gap between the gene-enhanced and the non–gene-enhanced. The rich will have taken advantage of the new cloning technologies, so their children will be smarter and free of disease, while the children of poor people will still suffer from the random draws of the natural genetic lottery, since their parents could not afford the new genetic treatments.

This is probably nonsense. Silver is assuming that the new treatments will always be expensive and that poor people will remain about as poor as they are today. More likely, the cost of genetic treatments will drop substantially, and poor people in the future will be much richer than poor people today are, so they will easily take advantage of the new medical technologies. For that matter, why not posit a future in which health insurance companies pay prospective parents to take advantage of genetic treatments and thereby avoid costly and painful medical procedures for their children later in life? That's more plausible than Silver's genetic class-warfare scenario.

Twenty-five years ago, bioluddites tried to stop recombinant DNA research, the technique which allows scientists to swap genes from one organism to another. Today Nobel laureate James Watson, the co-discoverer of the structure of DNA, is worried about the new assault on biotechnological progress. "Ever since we achieved a breakthrough in the area of recombinant DNA in 1973, left-wing nuts and environmental kooks have been screaming that we will create some kind of Frankenstein bug or Andromeda strain that will destroy us all," Watson tells Kolata. "Now we are threatened with a truly imbecilic law that could set back research for years." Kolata notes that "the transformation of recombinant DNA from the greatest threat since the atom bomb to a tool for the pharma-

ceutical industry occurred with little comment."

"Human essence came into existence simply because those with it could outcompete and kill those without it," writes Silver. "But if human minds have the ability to contemplate and direct changes in the copies of their own genomes that they give to future generations, the human mind is much more than the genes that brought it into existence." Let's hope that humanity will not shrink from using this promising new brainchild, continuing what Francis Bacon called "the conquest of nature for the relief of man's estate."

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Casting the Net

By Nick Gillespie

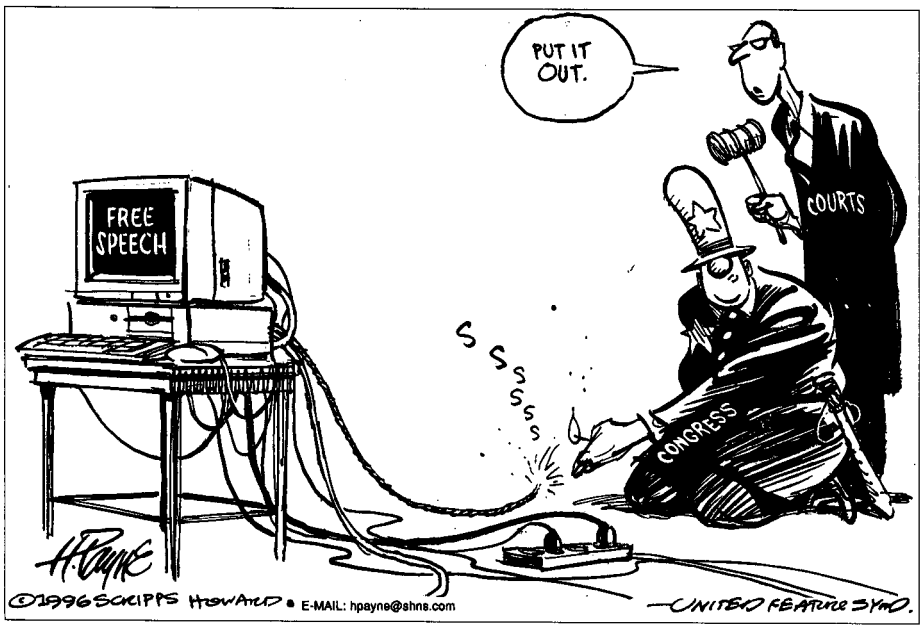
net.wars, by Wendy M. Grossman, New York: New York University Press, 236 pages, $21.95

Near where I grew up in New Jersey lie the ruins of a 19th-century Fourierist settlement, a utopian experiment devoted to communal living that lasted about a decade before the participants realized that they simply couldn't bear the sight of each other anymore. My friends and I would ride our bikes past the historical markers and the old foundations and crack jokes about the folly of building paradise in New Jersey, of all places.

The utopian impulse is, of course, one of the bedrock elements of American history and culture. In a real sense, evocations such as John Winthrop's dream of the Massachusetts Bay Colony as a "city on a hill" helped create and sustain America, both as an actual historical place and as an imagined location where human beings would somehow be freed from the failings and imperfections they evidenced all too abundantly elsewhere in the world.

Utopias always fail to deliver fully on their promises—and their dismal success rate in American settings has energized memorable fictional treatments ranging from Nathaniel Hawthorne's 1852 novel, *The Blithedale Romance* (which details the author's disheartening experience with the famous Brook Farm commune in Massachusetts), to F. Scott Fitzgerald's 1925 book, *The Great Gatsby* (which in its final passages turns to a compelling meditation on the unfulfilled potential of the New World), to Arthur Penn's wonderful 1969 film *Alice's Restaurant* (which is very loosely based on the Arlo Guthrie song and takes place at a fractious hippie commune). Different schemes fail for different reasons, but one of the main causes is that utopias are typically envisioned as complete, perfect just-so situations; as total, fixed end-states rather than as continuing processes of social evolution, adjustment, and change.

This isn't to say that utopian communities yield no benefits: They provide larger society with all sorts of models, examples, and possibilities for human interaction. The *perfect* union is perhaps impossibly elusive, but to the extent that America has delivered on its utopian promise, it remains inspired by the pursuit of, to echo the Constitution, "more perfect" unions. That recognition of process, built into the United States' founding document, underwrites whatever success the American "experiment" has enjoyed. Indeed, what my adolescent friends and I failed to recognize was that we *were* living in Utopia, or at least its kissing cousin—a voluntary association that benefited those who participated. Few of us were natives to either my hometown or even New Jersey. Our parents had moved there for basically the same purpose: the opportunity to build a better life. (For similar reasons, so too would I and most of my friends leave the area in a few years.)



HENRY PAYNE

Such an appreciation for process, for the pursuit of "more perfect" social arrangements, informs Wendy M. Grossman's *net.wars,* a nuanced map to the latest "place" to inspire grand utopian thinking: the Internet, that ethereal and increasingly important worldwide network of computer networks. In exploring the unfolding of cyberspace, particularly "the Net's convulsions over the years 1993 to 1996, as it tried to assimilate huge numbers of new users who didn't share the culture that had been developing over the previous decade," Grossman charts its customs and practices, engages the attitudes of its advocates and its critics, and suggests some of its more likely developments. She also documents how many of the same foibles that disrupt and undermine "real" human communities have been uploaded into our virtual ones, how Net users are groping

toward ever-more complex interactions, and how cyberspace is structured to encourage such efforts.

An American journalist living in London, Grossman brings a wealth of professional and personal experience to the material—and a clarity of style and analysis that is a welcome relief from both the hyperbolic prose of many Net boosters and the overwrought jeremiads of cyberphobes. In a characteristic passage, for instance, she writes, "Journalists who don't use the Net themselves routinely make such egregious technological and cultural errors that you can only compare the results to what would happen if they were assigned to write about the interstate highway system based on their experiences at sea.... [I]f the police told you that prostitutes routinely and openly solicited truckers and other visitors to roadside rest areas and that therefore they were risky places for families to visit, you would probably believe them and write the story....At the same time, after a while it's easy to lose perspective and forget that behavior which is common and tolerated on the Net seems shocking to newcomers."

Grossman also shares a widespread, perhaps even modal, mindset among longtime Net users. While cybergurus such as John Perry Barlow, a co-founder of the Electronic Frontier Foundation, a cyberspace-oriented civil liberties group, have characterized the Internet as populated by "50 million screaming libertarians," the reality is more complicated and ambivalent. There is no question that in many ways, Net culture parallels much of libertarianism: It is individualistic and tolerant of diverse lifestyles and ideas, comfortable with rapid technological and sociological innovation, and intensely suspicious of government intervention in speech and privacy matters.

But many digerati also tend to be very critical of the profit motive and to view the increasing presence of commercial activity on the Net with worry and disdain; while they are outraged by government attempts to regulate Net content and to collect personal data, they are often no less offended when private businesses behave similarly. Grossman shares this attitude, which makes her book a sort of double guide: Not only does she tell us about Net culture, she embodies it. "I would like," she announces in her introduction, "to see the freedom of the old net.culture survive in the face of the many competing commercial and regulatory interests that might prefer to limit its reach and openness."

net.wars revolves around a series of "boundary disputes" occasioned by the rise of cyberspace as a zone of meaningful human interaction. Grossman devotes chapters to topics such as government attempts to stymie the development of encryption programs that would allow computer users essentially perfect privacy; the Church of Scientology's legal battle against former members who posted copyrighted materials to Usenet newsgroups (see "New World War," April 1996); and the Internet community's campaign against the Communications Decency Act, which was eventually declared unconstitutional by the U.S. Supreme Court last year.

While cybergurus have characterized the Internet as populated by "50 million screaming libertarians," the reality is more complicated and ambivalent. Many longtime Net users tend to be very critical of the profit motive and to view the increasing presence of commercial activity on the Net with worry and disdain.

These discussions are populated with interesting characters (such as Bell Labs researcher Matt Blaze, who with almost casual expertise cracked the "Clipper chip," the Clinton administration's favored approach to government-friendly encryption) and moments (such as when some hackers, in a fit of pique over the CDA, doctored the Department of Justice's World Wide Web site to read "Department of Injustice"). Grossman's expatriate status also heightens her sensitivity to the global implications of the heavy American presence on the Net (roughly 60 percent of Internet hosts are based in the United States). In noting that the CDA "would have criminalized the...transmission of indecent material to minors," she writes, "The notion that we might have exported American Puritanism is ironic, because in the early 1990s the great fear outside the United States was that we would, via the Net, impose our tradition of freedom of speech on other countries who didn't want it."

As informative as such chapters may be (even to those already familiar with the subject matter), the more interesting parts of *net.wars* deal with less obvious "boundary disputes." The chapter called "Make.Money.Fast," for instance, chronicles the rise of commercial "spam"—bulk postings to Usenet newsgroups—in the mid-'90s and the way it affected the Net's low-key approach and ambivalence toward electronic commerce. As Grossman tells the story, the deluge effectively began in 1994 when Laurence Canter and Martha Siegel, later the authors of *How To Make a Fortune on the Information Superhighway*, posted to every newsgroup they could find a message advertising their services in helping immigrants to apply for work visas. Canter and Siegel's mass posting was done in such a way that it caused "maximum disruption," recounts Grossman. "Each news-storing computer... around the world had to find space for 10,000 copies of the message instead of just one....[The posting also] disabled the facility within most reader software to mark a post as read if it's been seen in one newsgroup, so that you don't have to keep rereading the same post in newsgroup after newsgroup."

The reaction among Net users was, says Grossman, "sheer fury": Angry people flooded newsgroups with complaints and more technically adept net users bombarded Canter and Siegel with angry e-mail and massive files designed to clog up their Internet account. Despite such a hostile response, though, commercial spam's time had come and, as Grossman laments, "There are very few areas of Usenet these days where you don't have to

pick your way through piles of spam."

Indeed, by 1996, junk e-mail sent directly to individual Net users had arrived. Though Grossman is even more bothered by this development, she notes that Internet service providers quickly adapted by making it fairly easy for users to block junk e-mail—the sort of rapid-response development that seems to define cyberspace. Subsequent court cases between commercial spammers and Internet service providers—some of which have led to spammers getting out of the business altogether—have also changed the cyber-landscape.

Along similar lines, in a chapter called "The Making of an Underclass: AOL," Grossman investigates the hostility that many "Netheads" evince toward users of America Online, the world's most popular online service. She traces the problem to March 1994, when AOL added a feature that allowed users to access Usenet newsgroups for the first time. At the time, AOL had about a million users (it now has more than 10 million), many of whom were unaware of the often-arcane etiquette of Usenet. For instance, a number of AOL users apparently blundered into the *alt.best.of.internet*, a newsgroup specifically designed as a place where people only reposted messages from other newsgroups. "The rule was and still is," writes Grossman, "no comments, no original messages, repostings only." The AOL "newbies" enraged Usenet veterans by constantly posting messages of the "Hello" and "Hey, is this working?" variety.

Compounding the negative reaction to AOLers, explains Grossman, was the "instinctive resentment of any hint of commercializing the Internet...the perception was that AOL neither knew nor cared about net.traditions but was only interested in sticking a meter on a free resource and billing its users extortionately." As a subscriber since the early 1990s, I can corroborate the often shabby treatment leveled at AOL members for no apparent reason other than the *@aol.com* stuck at the end of an electronic address.

By the same token, such incidents are growing fewer and further between—a trend that underscores the way in which the Net is constantly changing, growing, and accommodating more and more people. It's worth pointing out that AOL itself is constantly changing, too: Despite its early emphasis on members-only discussion groups, proprietary content, and hourly rates, it has quickly responded to the development of the World Wide Web by giving its member Internet access, deemphasizing its exclusive content and forums, and offering flat-rate usage plans. (Like the Net itself, AOL has not always negotiated such changes easily.)

Somewhat reluctantly, Grossman can appreciate that convenient, easy-access services such as AOL have helped give the masses access to the benefits of the Internet, even as that great migration inevitably redraws the shape of cyberspace in all sorts of good, bad, and neutral ways. In any case, her ambivalence toward AOL and commercial activity doesn't undercut her appreciation for how the Net is constantly developing in response to user needs and demands. In a chapter called "Networks of Trust," for instance, she discusses how electronic "middlemen" are arising to help facilitate and certify electronic commerce.

It may well be that in the years, decades, or even centuries to come, we—or our descendants—will gaze upon the ruins of the Internet (whatever form they might take) and wonder what all the excitement was about. With this in mind, the great virtue of *net.wars* is its recognition that cyberspace's utopian potential—its ability to enrich existing real communities while creating new, virtual ones—is directly tied to its ability to change, grow, and make itself useful to its inhabitants. In showing how that process works in both historical and cultural terms, Grossman has written an intriguing account of the Internet's partial fulfillment of its seemingly limitless promise.

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Atrocity Exhibition

By Carl F. Horowitz

The Rape of Nanking: The Forgotten Holocaust of World War II, by Iris Chang, New York: Basic Books, 290 pages, $25.00

Ienaga Saburo had been an unusually busy man, and not out of choice. In 1965 the Japanese historian sued his government for forcing him to rewrite a portion of a textbook. The Ministry of Education was incensed over his brief denunciation of Japanese genocide against at least 300,000 civilians in the Chinese city of Nanking during December 1937 and January 1938. Just mentioning this World War II story would have been bad enough.

Luckily, in 1970 a Tokyo judge ruled in Saburo's favor, saying textbook screening could not go beyond correction of factual and typographical errors. Japanese ultranationalists, in retaliation, fired off death threats to the judge, Saburo, and his attorneys. They also demonstrated outside his house, screaming slogans and banging pots and pans.

The lawsuit proved to be the snowball that led to the current avalanche of worldwide outrage over the Rape of Nanking and its long cover-up. It also inspired a new generation of tenacious researchers, one of whom is Iris Chang, a 29-year-old Chinese-American author whose grandparents survived the slaughter. In writing this book, the first full-length, English-language account, Chang conducted interviews with survivors, reviewed film footage, and pored through official documents. Her work speaks much not only about genocide but about how a nation prepares its people to commit and whitewash it.

At least in America we know a lot more than before; in Japan, the dissemination mills grind more slowly. Not only is Nanking unmentionable, apparently in some quarters so is America. Early this decade one Japanese high school teacher expressed surprise that his students did not know their country had been at war with the United States. The first thing they'd wanted to know was who won. Whatever

"unfortunate" circumstances occurred in Nanking, say official spokesmen (and still most textbooks), these incidents were isolated, if they occurred at all.

Chang knows that a successful official truth shield must be unyielding. To allow a single crack in the foundation of silence risks setting in motion the collapse of the whole edifice. She terms Japan's silence and disinformation campaign "the second rape," which began even while the first was in progress. One headline of a Japanese-controlled newspaper in Shanghai in January 1938 blared the headline, "The Harmonious Atmosphere of Nanking City Develops Enjoyably." The article claimed, "The Imperial Army entered the city, put their bayonets in their sheath, and stretched forth merciful hands in order to examine and heal."

Once the facts became known, the lying had to assume a different guise; a conflating of crimes and mistakes. This attitude extends to Japan's academic community. "How long must we apologize for the mistakes we have made?" one indignant Japanese professor complained. Tyrants (and their enablers) everywhere love that kind of talk. Late last year Pol Pot offered the following explanation for why his Khmer Rouge had turned Cambodia into killing fields: "We made mistakes. We were young." So *that's* the secret. In that vein, let us examine a few of the strategic "mistakes" young Japanese troops committed in Nanking.

On December 13, 1937, victorious soldiers, giving glory to the emperor, poured into the Chinese capital of Nanking. For the Japanese, it was now open season on the city's entire population, as they shot countless civilians attempting to escape. Alleys, dugouts, buildings, streets, ditches—no place was safe for the Chinese to hide. Soldiers impaled babies on bayonets and tossed them while still alive into pots of boiling water. The Rape of Nanking was all too literally that, as soldiers raped anywhere from 20,000 to 80,000 Chinese women and girls from all social classes. They forced many into prostitution and killed them when they no longer could fulfill sexual requirements. An untold number of women either died from rape-related injuries or committed suicide. At times, the troops found the going a bit boring. Hence, they devised killing contests and a variety of torture-deaths, such as live burials, mutilation, burnings, death by freezing, and "death by dogs" (in which Japanese soldiers buried Chinese victims up to the waist and set German shepherds upon them).

Lurid beyond belief as such stories seem, the sources are unimpeachable. Chang has drawn much from detailed accounts by American and European missionaries and businessmen. We owe much to the Nanking International Safety Zone Committee, whose missionaries, such as George Fitch, James McCallum, and John Magee, eloquently chronicled their observations on film as well as in reports and diaries. At risk to their own lives, they mimeographed or retyped reports so that friends, relatives, government officials, and the press could receive copies. Some dispatches found their way into mainstream periodicals, such as *Reader's Digest.* Editors at that magazine, concerned over the credibility of its initial exposé, continued to collect letters from Safety Zone Committee leaders and reprinted them several months later. "The material we have seen," the editors noted, "would fill an entire issue of this magazine, all of it corroborating the typical extracts which follow."

The horrors of Nanking resemble all too closely recent events in Bosnia, Rwanda, and elsewhere. Chang tries to explain how a culture of obedience helped bring them about. "How could it be that a country as civilized as Germany...?" This classic incredulity over the Holocaust easily could be the point of departure in pondering how Japanese soldiers ("honorary Aryans," in Hitler's eyes) could have maimed, raped, tortured, and murdered so many unarmed civilians of all ages. (Ironically, it was a German businessman and Nazi loyalist, John Rabe, who emerged as the unlikely humanitarian hero, helping to create the Safety Zone and saving some 300,000 lives in the process.) While the Nazi atrocities rightly continue to be tagged as absolute evil, Japan's are merely the product of "fanaticism." But fanatics aren't born, and as Chang explains, the methods to their madness had origins.

First, Japan since the Meiji Restoration of 1868 had revamped its system of education to the point where schooling and preparation for war had become almost interchangeable. Student-teachers, for example, were housed in barracks during their training and subject to harsh discipline and indoctrination. By the 1930s many teachers themselves were military officers, lecturing students on their divine duty to conquer Asia. Obedience to authority, most of all to the

The Reality of Nanking: Whatever "unfortunate" circumstances occurred, say Japanese spokesmen—and most Japanese textbooks—these incidents were isolated, if they occurred at all.

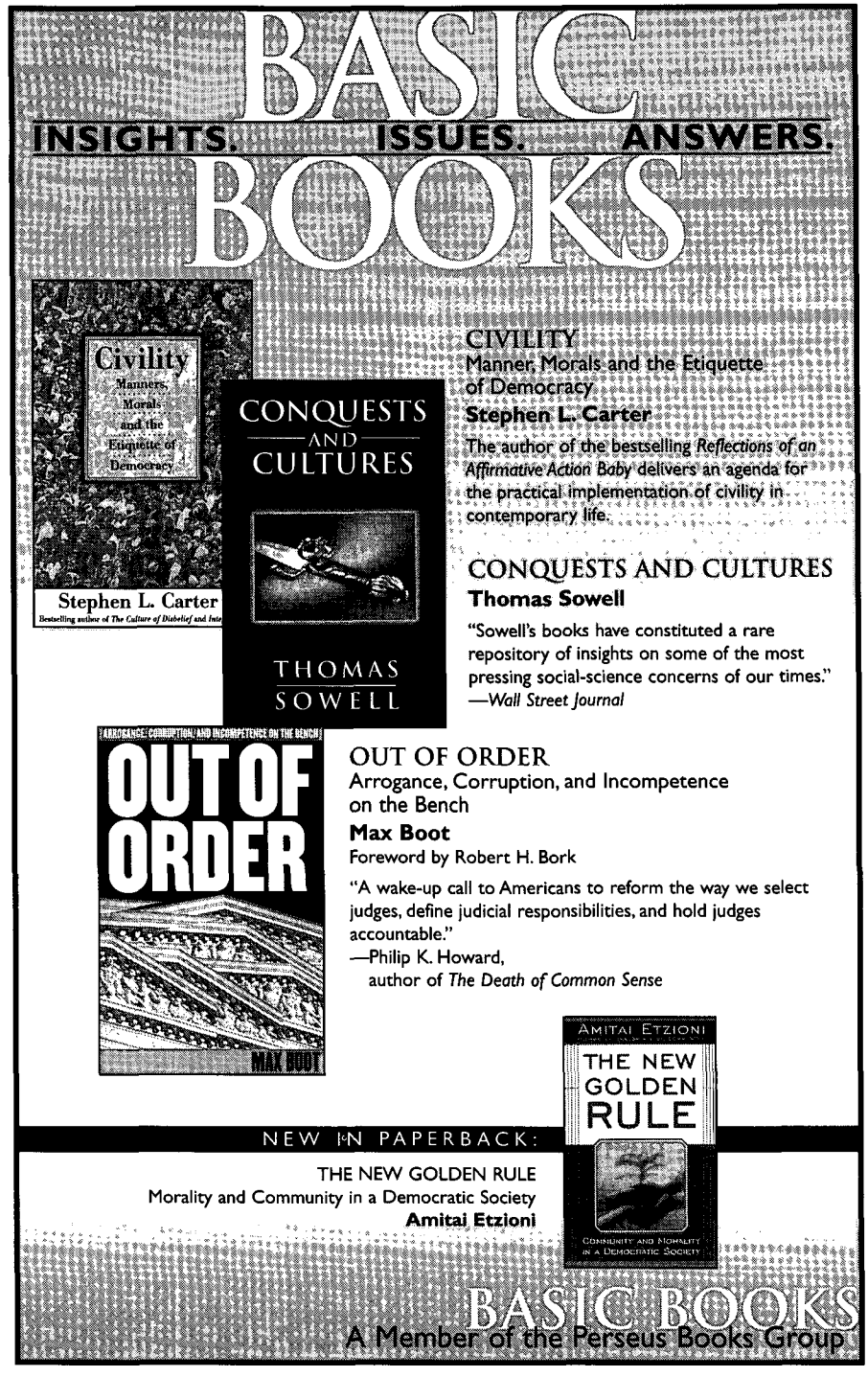
REVOLUTIONARY DOCUMENTS, TAIPEI

emperor, was the cardinal virtue. Teachers would instill shame and terror in renegade students, often by slapping, punching, and bludgeoning. Hatred for the Chinese was part of the core curriculum, no matter what the pretext. Chang recounts one story of a teacher who punched a boy in class for being squeamish about dissecting a frog. The teacher yelled, "Why are you crying about one lousy frog. When you grow up you'll have to kill one hundred, two hundred chinks!"

Training for military recruits took such "schooling" to its logical conclusion. If the schools were molding a New Japanese Citizen—stoic, brutal, and obedient—the military wanted the cream of the crop. Officers were unceasing in their abuse, often slapping and punching recruits until they bled, saying: "I do not beat you because I hate you. I beat you because I care for you." The idea was to instill in young soldiers a numbness to killing civilians, not just soldiers. In any society, Chang observes, those with the least power "are often the most sadistic if given the power of life and death over people even lower on the pecking order." In Japan, those at the bottom of the military hierarchy turned their wrath on the Chinese, a people they'd been trained to regard, quite literally, as less than human. A culture war was about to become a shooting one.

Iris Chang recognizes that modern ethnic cleansing is grassroots tyranny gone national; the problem is less "the state" per se than a certain social type who seizes the state's institutions, most of all its military, as a means to subjugate groups of outsider status.

That leads to a second major reason for the Nanking genocide: sadism as an affirmation of traditional cultural loyalty. Social rank, even in modern Japan, was still determined by proximity to the emperor and enforced by ritualized politeness. Chang recognizes that civility, when elevated to a cult, justifies rather than discourages violent behavior. For centuries a Samurai warrior had the authority to cut off the head of any peasant who failed to answer questions politely. Citing Ruth Benedict's *The Chrysanthemum and the Sword*, Chang notes the Samurai code was localized; that is, a person could commit atrocities on foreign turf that they would regard as unthinkable on their own. Though with less rigor than Michael Ignatieff's new book, *The Warrior's Honor*, Chang recognizes that modern ethnic cleansing is grassroots tyranny gone national; the problem is less "the state" per se than a certain social type who seizes the state's institutions, most of all its military,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as a means to subjugate groups of outsider status. At once Westernizing and fiercely anti-Western, Japan's radical militarists paradoxically used the tools of modernity to mobilize for the defense of tradition.

There remains much work to be done in getting the Japanese government to reckon with truth, but change is occurring. In the spring of 1994 the new Japanese justice minister, Gen. Nagano Shigeto, gave a newspaper interview claiming the Nanking massacre was a fabrication; the uproar across Asia triggered his quick resignation. In late 1996 our own Justice Department established a watch list of Japanese war criminals with the intent of barring them from entering the country.

While the publication of *The Rape of Nanking* will surely spur similar developments, Chang's analysis of Nanking holds a lesson for contemporary America, too, one that should resonate with libertarians: Beware of those who, in the name of maintaining and recovering "tradition," turn to the state as a blunt instrument of moral development in citizens. ◆

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Taking It to the Streets

By Fred Siegel

Official Negligence: How Rodney King and the Riots Changed Los Angeles and the LAPD, by Lou Cannon, New York: Times Books, 698 pages, $35.00

A decade ago, an African-American teenager named Tawana Brawley captured national attention by claiming she had been raped by a gang of whites, including a prosecutor and law enforcement officers. The story turned out to be a hoax, reversing the KKK myth of a virtuous white woman defiled by black men.

In a classic example of what used to be called racist and is now called multicultural thinking, the truth or falsity of Brawley's claims was beside the point for some. As the famed left-wing lawyer William Kunstler explained, "It makes no difference anymore whether the attack on Tawana really happened. It doesn't disguise the fact that a lot of young black women are treated the way she said she was treated."

But it made a big difference to Stephen Pagones, the young assistant district attorney falsely accused of taking part in the rape. He is suing the Rev. Al Sharpton, who helped broadcast Brawley's allegations, for libel. To this day Sharpton insists, à la Kunstler, that the facts about a particular individual are unimportant. Sharpton also insists he believes Brawley—that's the defense he's using in the libel case.

The same pernicious displacement of individual accountability by group identity stands behind the disastrous policies that helped detonate the 1992 Los Angeles riots. Lou Cannon's book *Official Negligence* will be read by many as a revisionist account of the Rodney King affair and the L.A. riots. Parts of the book, particularly the story of how Police Chief Daryl Gates left his post at the onset of the riots, are familiar. But the bulk of the book's painstaking 600 pages of main text is devoted to a detailed account of the Rodney King trials that will force readers to revise their old assumptions about the case.

Official Negligence, which deserves the widest possible readership, is a small monument to the ideal of objectivity on the topic of race, where empiricism has long since given way to tribal versions of truth.

Still, the book offers much more than a provocative take on the King episode. For Cannon, a longtime Los Angeles correspondent for *The Washington Post*, a respect for the individual and a respect for the evidence go hand in hand. *Official Negligence*, which deserves the widest possible readership, is a small monument to the ideal of objectivity on the topic of race, where empiricism has long since given way to tribal versions of truth.

Media coverage of the Rodney King case depicted an incident in which a group of racist cops had beaten an innocent black man without provocation and joked about what they had done. For many journalists, the story—or at least the portion of the videotape repeatedly shown on TV—fit an old script, with the LAPD in the role of Bull Connor and Rodney King in the role of a peaceful civil rights marcher.

Most reporters, together with the general public, saw only the edited, 68-second version of the video, which left the impression that Rodney King had been beaten for no reason other than the color of his skin. When the case came to trial in the virtually all-white Simi Valley, jurors discovered there was another section of the tape which had not been shown on TV because of its poor quality. The previously unseen 13 seconds helped frame the case for Simi Valley's conservative jurors, who were already inclined to be suspicious of the media. The restored footage placed the case in a very different context by showing Rodney King charging at Laurence Powell, one of the cops at the scene.

In the five minutes before the tape was shot, Sgt. Stacey Koon of the LAPD had taken charge of the case, in part because he feared that Melanie Singer, the California Highway Patrol officer who was the first to confront the drunken King after a high-speed chase, might use the gun she had drawn. Koon, unlike Laurence Powell, was anything but a racist. A stiff-necked man with a strong sense of his own rectitude, Koon had saved the life of a black transvestite with mouth-to-mouth resuscitation; he had also pursued, on his own time, a white cop who had abused two black

homeless men.

Taking over from Singer, Koon found that his commands were ignored by the muscular, six-foot-one-inch, 250-pound King, who tossed two cops off his back and took two shots from an electronic stun gun, only to keep coming. It was then that the police, barred from using a choke hold and fearful that King was hopped up on PCP, subdued him with the numerous blows from metal batons that were recorded on the tape.

Reviewing all the evidence, Cannon concludes that the Simi Valley verdict of innocence for three of the cops, while a very close call, was probably justified. He notes that in the case of Laurence Powell, the one cop whose behavior probably was criminal, there was a hung jury, so he would have had to be retried. (He was ultimately convicted in federal court.) But these shades of gray would not mean much after the innocent verdicts helped trigger the riots.

AP / WIDE WORLD PHOTOS

California Bleeding: For decades, argues Lou Cannon, the LAPD failed to treat the city's African Americans as individuals, with corrosive consequences. Despite a high percentage of minority officers, the department's paramilitary "kiss the concrete" style treated civilians as suspects to be confronted rather than citizens to be served.

If Koon was probably innocent and Powell probably guilty, no such mixed judgment was possible regarding the LAPD, which failed to treat the city's African Americans as individuals, with corrosive consequences. The problem with the LAPD was not a lack of minority officers; in fact, there was a higher percentage of African Americans on the force than in the general population. Rather, it was the department's paramilitary, "kiss the concrete" style of operation, which indiscriminately treated civilians, particularly in South Central L.A., as suspects to be confronted rather than citizens to be served.

The LAPD—which, under Gates, pioneered the use of SWAT teams—invested a great deal in high-tech helicopters and very little in community relations. Under the leadership of the legendary William Parker, chief from 1950–1966, the officers were trained to keep their distance from the people they were supposed to protect, on the ground that contact could only lead to corruption. This distance, combined with large-scale sweeps that drew the innocent as well as the guilty into police dragnets, meant that in South Central the old saw about the police as an army of occupation carried more than just a ring of truth.

Part of the problem lay in L.A.'s unique version of the two-party system dating back to the 1950s, under which the police chief, given virtual autonomy by the city charter, was inevitably seen as the mayor's political rival. In the early 1970s, when Parker's successor, Ed Davis, tried to bring police into closer contact with residents through the kind of community policing that has been so successful in Rudy Giuliani's New York, he was rebuffed by Mayor Tom Bradley, who emerges as one of the villains in Cannon's book. In a city without a civic life to speak of, Bradley was afraid that the community relations officers, all 17 of them, might be influential enough to serve as the basis for a political machine operating on behalf of Davis, who was talking about running for mayor. It was a fateful decision, since it meant that, as with the 1965 Watts riots, hostility toward the authorities was left to smolder.

If the Rodney King experience wasn't bad enough, the black population's suspicions of the police and the legal system were stoked by the Latasha Harlins case. The Empire Liquor Market Deli in South Central had been repeatedly robbed and sometimes terrorized by black gang members, explains Cannon, so when Harlins, a teenager with no criminal record, entered the store in March 1991, owner Soon Ja Du "expected the worst from the black girl." Baseless accusations of shoplifting led to a fight, and the storekeeper fired a bullet into the back of Harlins's head as she was leaving the store. The incident was bad enough; what made it worse was the conduct of Judge Joyce Karlin, who let Du off with probation on the ground that her actions resulted from social conditions which left her justifiably fearful. Once again, individual accountability was sacrificed at the altar of group identity, and the murderer of a black girl got off lightly —as would the African Americans who beat truck driver Reginald Denny nearly to death during the riots.

The lesson of Cannon's book can be summed up by an exchange between William Graham Sumner, a Reconstruction-era senator who wanted to punish the South, and Ralph Waldo Emerson. Sumner is supposed to have told Emerson that "in my zeal for the cause, I have risen above consideration for mere individuals." Emerson is said to have replied, "My dear sir, I hadn't realized that even God had reached that stage." ◆

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Impossible Dream

Why private matters make bad public policy

By Thomas W. Hazlett

Sitting atop the greatest economic engine in history, the citizenry of the U.S. of A.—when not too pooped from R&R at their Cabo timeshares or frenzied by their latest spending spree at the Mall of America—have a foreboding feeling about the course that their society is running. They sense that there are many, many things that are broken, and that they are way too busy to take the task on themselves—at least until the basketball playoffs are over.

In walks Bill Clinton, a sweet-talkin' Mr. Fix-It. The president is a governmental handyman, a statesman with a tool belt, a man who will spend $10 million on a survey to find out what $1 billion program the voters say they want, spend $4 billion to give it to them, and create $1,000 of gross value in the process. He'll mandate V-chips on TVs that are never watched; he'll create a dozen federal death penalties for crimes that never get committed; he'll create a vast federal program to inoculate our youngsters against infectious disease while we watch the vaccinated population dip. Why, he'll even strangle that ghastly Joe Camel with his own tobacco-PAC–stained fingers in a dramatic *faux* rescue of America's youth.

"I'm from the government, and I'm here to help you" used to be a punchline that translated seamlessly into any of the dozens of languages spoken in the United States. But the great talents of President Willie and his slick sales force have overcome our native skepticism of government and sent a steady stream of bumbling repairmen into the American home and workplace. Clinton is always at the front door, smilin' and telling you about today's special incentive program: "Your children will love it, it'll make your whole family healthier and wiser, and the neighbors down the block will pay for the whole thing. But you must sign up with the pollster right now, because by tomorrow this fantastic program could be ended by the extremist Republican Congress."

Voter demand for such fantastic bargains remains brisk, despite the disappointing results of previous offers, thanks largely to the marketing genius of "new & improved." New Democrats and Newt Republicans repackage the recalled products of yesteryear in stunningly effective fashion. But each and every such policy sale crowds out alternatives.

Alas, the state is not about subtle trade-offs concerning Monica's desire for hatpins vs. Bill's desire for poetry but about the brutish task of divining and enforcing one-size-fits-all rules and taxes.

When politicians and bureaucrats anoint winners and losers in social decisions governing matters of personal preference, *choices* become *programs.* This seemingly subtle shift yields fabulous angles for pols spouting focus-group–tested "solutions," while rendering individuals impotent and accountability nil.

Take the public schools: Can there be a more contentious slice of social life to place in the hands of the state? Can we create any more political dyspepsia than to mandate that everyone's (or no one's) kids be rustled away and taught moral values, condom technique, Creationism, "lifestyles"—not to mention literature, history, and civics? Is *Heather Has Two Mommies* the appropriate text—or would the Jimmy Swaggart Redemption Sermon Video be preferred? As a matter of iron-clad public policy, should kids wear uniforms, segregate by gender, immerse in English or Español or Ebonics?

Not only *could* reasonable people disagree—we can predict with absolute certainty that reasonable people *will* disagree. The cultural diversity that is our democratic bonus puts parents at odds with one another on virtually every one of a long checklist of specific educational approaches.

People on the losing end of Department of Education policy are today doing some pretty desperate deals: Local school boards have OK'd single-sex schools in an effort to beef up product. Civil libertarians are suing to stop this mischief, outraged by such a sexist use of tax dollars.

Christians are moving to amend the First Amendment to bust open the constitutional prohibition on prayer in schools. Popular with conservative GOP congressmen, the constitutional amendment proffered by Rep. Ernest Istook (R-Okla.) has actually made it out of the House Judiciary Committee.

Rather than dancing on the edge of this slippery slope, why not simply choose freedom? Under a school choice plan, folks could resolve such life-and-death conflicts without Bill of Rights brinkmanship. Those who found that their offspring's optimum was assured by Mrs. Tidy's Szechuan School for Afro-Centric Boys Wearing Knickers would be able to cash their vouchers accordingly and so realize their dream. Free to choose, people could themselves weigh costs and benefits of rival theories of education, rather than thrusting them upon the rest of us.

The path to a single solution that will please all is the road to nowhere. That is not to say that there aren't some who enjoy the pointless journey and profit mightily from hawking roadside souvenirs—mandatory school uniforms! increased teacher pay! national academic testing!—along the way.

Prediction: All this hellish searching for a nonexistent group solution will wear thin, one of these generations. Agreeing to disagree will be considered courteous behavior, and diversity of action may become more than a theoretical possibility. The Constitution will be safe, and the kids will all be above average. ◆

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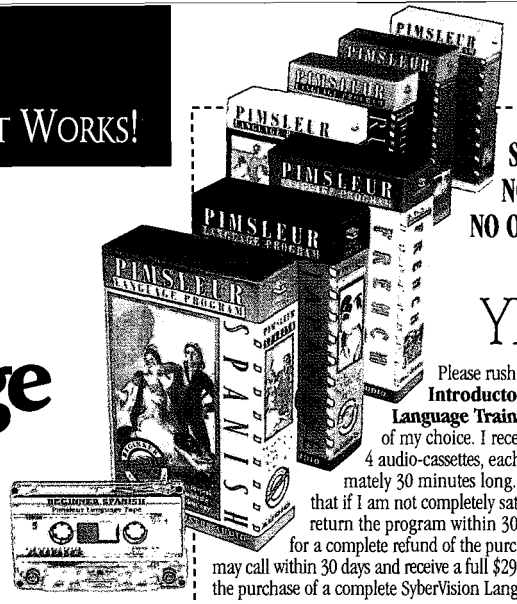

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